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INTRODUCTION

> [I]t does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.[1]

> Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial.[2]

> Any activity engaged in by a church as a body is an exercise of religion.[3]

> People will do some odd things for political or religious reasons, but that's nothing compared to what people will do for a buck.[4]

How seriously do we take the consequences of broad religious liberty exemptions? Should religious actors be exempt, for example, from generally applicable debtor-creditor or housing discrimination laws? As a matter of intuition, most of us would say "no." Among other functions, such laws protect discrete individuals from violations of "private rights." Thus, even proponents of the strongest protection for religious liberty typically agree that religious liberty should be protected "'in every case

1. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 159 (William Peden ed., 1972), *quoted in* Daniel Keating, *Bankruptcy, Tithing, and the Pocket-Picking Paradigm of Free Exercise*, 1996 U. ILL. L. REV. 1041, 1041 (internal citation omitted).

2. Murdock v. Pennsylvania, 319 U.S. 105, 110 (1943).

3. Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1390 (1981) (footnote omitted).

4. P.J. O'ROURKE, EAT THE RICH 4 (1998).

where it does not trespass on private rights . . . ."[5] Yet, while this dictum has a long pedigree,[6] and a certain intuitive appeal, it does not explain what a "private right" is for religious liberty purposes, or why "private rights" should always prevail.[7]

This Article considers these questions in the light of two recent, controversial cases, *In re Young*[8] and *Thomas v. Anchorage Equal Rights Commission.*[9] In *Young*, the United

5. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1128 (1990) (quoting Letter from James Madison to Edward Livingston (July 10, 1822) (internal citation omitted)).

6. As early as June 1776, for example, the Virginia Assembly of Representatives "declared 'that all men are equally entitled to the free exercise of their religion, or the duty they owe to their Creator, and the manner of discharging it according to the dictates of their consciences.'" The Sentiments of the Several Companies of Militia and Freeholders of Augusta, in Virginia, Communicated by the Deputies from the Said Companies and Freeholders to Their Representatives in the General Assembly of the Commonwealth (1776), *in* 2 PETER FORCE, AMERICAN ARCHIVES: FIFTH SERIES 816 (1851). In an apparent response, certain Virginians wrote to their representatives in October 1776 to say "[w]e take [the foregoing] to be the true and full meaning of their words, without any unjust view of favouring some to the hurt of others . . . ." *Id.*

7. I acknowledge at the outset that the "private" nature of rights is at best unclear, and at worst incoherent. A critic might point out that, unless you believe in natural law, all rights come from the "state," meaning that there are no "private" rights. As discussed below, I mean only that private rights protect individuals from "harm." What constitutes "harm" is, itself, a difficult question, which cannot be fully defined in this Article. Indeed, my thesis implies that courts should be left to make that determination on a case-by-case basis. The important distinction involves rights typically associated with the "police" power, on the one hand, and rights typically associated with discrete individuals, on the other. In exercising its police power, the state seeks, for its own sake, or the benefit of the diffuse and ill-defined general public, to prohibit an exercise of religion. *See, e.g.*, John Delaney, *Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of* Oregon v. Smith, 25 IND. L. REV. 71, 99 (1991) (noting that police power encompasses the power to "enact laws for the public health, safety and general welfare" (citations omitted)). Laws forbidding polygamy or the ingestion of peyote come to mind. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 166-67 (1878) (upholding a bigamy conviction against a free exercise challenge); Employment Div. v. Smith, 494 U.S. 872, 878-83 (1990) (upholding the denial of unemployment benefits for work-related "misconduct" in using of peyote). Such laws do not protect identifiable private individuals in any significant sense. As a practical matter, few private individuals would be able to show that such activities harmed them.

8. Christians v. Crystal Evangelical Free Church (*In re* Young), 82 F.3d 1407 (8th Cir. 1996), *reh'g en banc denied*, 89 F.3d 494 (8th Cir. 1996), *cert. granted, vacated, and remanded*, 521 U.S. 1114 (1997), *aff'd* 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 43 (1998).

9. 165 F.3d 692 (9th Cir. 1999), *opinion withdrawn on grant of reh'g by* Thomas v. Anchorage Equal Rights Comm'n, 192 F.3d 1208 (9th Cir. 1999).

States Court of Appeals for the Eighth Circuit held that the Religious Freedom Restoration Act of 1993 (RFRA)[10] was a defense to a constructive fraudulent conveyance action and thus precluded a bankruptcy trustee from avoiding and recovering insolvent religious debtors' otherwise avoidable church contributions. In *Thomas*, the United States Court of Appeals for the Ninth Circuit held that a "hybrid rights" theory—a combination of religious liberty and private property rights under the United States Constitution—entitled religious landlords to defy Alaska's fair housing laws and to refuse to rent residential real estate to unmarried couples.

As of this writing, the opinion in *Thomas* has been withdrawn, and the case has been scheduled for rehearing en banc after publication of this Article. One goal of this Article is to suggest ways that courts (including the Ninth Circuit) can avoid the problems created by *Young* and *Thomas*. Both decisions assume, with little analysis, that making gifts while insolvent and leasing real property, respectively, are exercises of religion. They come to this conclusion not by independently analyzing "religious exercise" or the transactions in question, but instead by deferring to the religious actors' characterization of the transactions as a religious exercise. Deference of this depth—I call it "deep deference"—can, in certain cases, be an appropriate judicial tool for resolving religious liberty disputes. For example, courts often defer deeply to church polities in cases involving internal matters of church doctrine, and in cases that pit religious actors against governmental bodies exercising their police power.[11] Yet, deference to the claim that an activity is a religious exercise appears to decline as courts seek to protect third parties from harm.

In *Young* and *Thomas*, the harms were fairly clear. There is little dispute that the Youngs' creditors were entitled, under well-established constructive fraudulent conveyance principles, to recover the Youngs' donations, but their private right to repayment was defeated by RFRA.[12] Similarly, in the *Thomas* case, unmarried couples in Alaska enjoyed a "private" right to be free from housing discrimination that was defeated by the

10. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1994); *see also* City of Boerne v. Flores, 521 U.S. 507, 511 (1997) (holding that Congress exceeded its power under the Fourteenth Amendment in enacting RFRA and therefore RFRA is unconstitutional as it applies to states).

11. *See infra* Part I.B.

12. *See infra* Part II.D.1.

combination of religious liberty and private property rights.[13] Although *Young* appears to be settled law within the Eighth Circuit, the withdrawal of the *Thomas* opinion creates the opportunity to re-examine judicial strategies for addressing the harm to third parties caused by religious liberty exemptions.

The problem with *Young* and *Thomas* is not their conclusions, but their methods—or, rather, their lack of methods. They fail to consider carefully whether donating money or leasing real estate are religious exercises,[14] and they engage in little or no balancing of competing harms.[15] A court could, under certain circumstances, conclude that these activities were religious exercises entitled to protection from the laws in question. It is disturbing, however, to see courts abdicate their responsibility to assess claims and weigh harms independently. Courts such as *Young* and *Thomas* disserve religious actors and potential third parties alike by deferring deeply in the face of third-party harm. Deference dilutes the seriousness with which we expect courts to consider matters as important as religion.

In a larger sense, balancing the rights of religious actors and third parties reflects the two competing anxieties that have historically defined the boundaries of our religious liberty jurisprudence. Free Exercise Clause jurisprudence reflects an anxiety of anarchy, the fear expressed by Justice Scalia in *Employment Division v. Smith*,[16] that broad religious liberty exemptions would court anarchy by permitting individuals to become laws "'unto themselves.'"[17] Establishment Clause jurisprudence reflects an anxiety of entanglement, the fear first expressed long ago in *Watson v. Jones* that civil courts will be forced to conduct "heresy trials" if they become too deeply involved in deciding religious liberty disputes.[18] These two anxieties—anarchy and entanglement—reflect judicial attempts to accommodate the many competing values of our religious liberty jurisprudence.[19] These anxieties create a tension that fos-

13. *See infra* Part II.D.2.

14. *See infra* Part I.D.

15. *See infra* Part II.D.

16. 494 U.S. 872 (1990).

17. *Id.* at 885 (citing Reynolds v. United States, 98 U.S. 145 (1878)).

18. 80 U.S. (13 Wall.) 679, 728 (1871); *see also infra* text accompanying notes 53-77.

19. These constitutional values include voluntarism (religious belief should arise voluntarily, and not as the product of government coercion), *see* Note, *Toward A Constitutional Definition of Religion*, 91 HARV. L. REV. 1056,

ters ordered liberty. The *Young* and *Thomas* decisions degrade the force of this healthy tension by ignoring it.

Courts—including the Ninth Circuit's *Thomas* rehearing panel—can avoid these shortcomings by using principles of equity jurisprudence. Equity, which is "[j]ustice administered according to fairness as contrasted with the strictly formulated rules of common law,"[20] is a useful source of substantial justice in conflicts between claims of religious liberty and third-party rights, for two reasons. First, equity grants courts expansive fact-finding powers. With such powers, courts may independently determine whether an activity is a religious exercise. Second, equity provides a well-established basis for balancing harms. Balancing harms enables a court to take seriously the rights of both religious actors and third parties who may be harmed by their exercise of religion.

Although principles of equity may aid judges seeking to resolve disputes between religious actors and third parties, equity does not tell judges how to set the "scale" in the first place. Courts could, for example, simply assume that all disputes between religious claimants and third parties are sui generis, to be resolved as if the scales were evenly set. Alternatively, courts could recognize a presumption in favor of the religious claimant, as did the United States Supreme Court in the cases that granted the broadest religious exemptions, *Sherbert v. Verner*[21] and *Wisconsin v. Yoder*.[22] This presumption may be appropriate when granting a religious liberty exemption would not result in harm to third parties. But, where third parties are likely to be harmed by an exemption, courts should not recognize a presumption in favor of religious claimants. In those cases, courts should carefully consider the balance of harms, without privileging, ab initio, religion or private rights.

1058 (1978) (noting that "[t]he core of the Free Exercise Clause is voluntarism"), separatism (that government and religion should not intermingle), *see, e.g.*, Everson v. Board of Educ., 330 U.S. 1, 16 (1947), and pluralism (that diversity of belief and practice is inherently valuable in a free society), *see, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 689 (1970) (Brennan, J., concurring).

20. BLACK'S LAW DICTIONARY 484 (5th ed. 1979). *See generally infra* Part III.A.

21. 374 U.S. 398, 402, 408-09 (1963) (holding that a Seventh Day Adventist may not be denied unemployment benefits for refusing to work on days of worship).

22. 406 U.S. 205, 221, 234-36 (1972) (holding the Amish exempt from laws compelling public school attendance).

This Article proceeds in three parts. Part I considers the definitional problem: How, if at all, can courts determine whether activities that potentially harm third parties are nevertheless religious exercises? Part I focuses on the role that deference plays in defining religion, and argues that deference is unsound when defining an activity as a religious exercise would have the effect of harming third parties. Part II considers the role of balancing harms in religious liberty disputes: How have courts balanced harms when a religious exemption would harm third parties? Part II argues that, in eliminating the judicial duty to balance harms in religious liberty disputes, *Employment Division v. Smith* unwittingly created the very anarchy it sought to avoid. Part III describes ways that equity jurisprudence can remedy both the problems of defining religion and balancing harms.

I. DEFINING RELIGION AND THE ANXIETY OF ENTANGLEMENT

The first half of the problem with *Young* and *Thomas* has to do with definitions:[23] How, if at all, were the activities in question exercises of "religion?" The cases do not say, except in the most attenuated sense. They simply defer to the claimants' claims that renting real estate or making donations while insolvent are religious exercises. Deep deference of this sort is often an acceptable, perhaps necessary, approach to resolving religious liberty disputes. Thus, the internal affairs cases discussed below defer deeply for fear of entanglement in doctrinal matters. Yet deference often follows a continuum that distinguishes harm to individuals from harm to the state. When defining an activity as a "religious exercise" threatens to harm third parties—rather than dilute the police power of the state—the Supreme Court has usually been far less deferential. Instead, the Court appears to engage in a "transactional analysis," scrutinizing independently the transaction that actually occurred, notwithstanding the claim that it is a religious exercise.

The First Amendment of the Constitution is the source of protection for religious liberty, providing that neither federal nor state governments may make any law "respecting an es-

23. The second half of the problem is whether—and if so, how—courts can balance harms in religious liberty disputes involving third parties. *See infra* Part II.

tablishment of religion or prohibiting the free exercise thereof."[24] But the Constitution does not define the operative terms—"religion," "exercise," or "free."[25] Courts[26] and scholars, legal[27] and otherwise,[28] have all wrestled with the definitional problem.[29] To date, there has been little consensus. Instead of defining religion, courts often focus on the contours of permis-

24. U.S. CONST. amend I. The First Amendment applies to state law by "incorporation" into the Fourteenth Amendment. *See* Cantwell v. Connecticut 310 U.S. 296, 303 (1940).

25. Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 69 (1996) ("The questions of what is 'free exercise,' what is 'religion,' or what is a law 'prohibiting' free exercise, find no answers in the wording of the [Free Exercise] Clause.").

26. *See, e.g.*, United States v. Seeger, 380 U.S. 163, 173-76 (1965) (defining religion in the context of a conscientious objector provision of a statute governing military conscription); Dettmer v. Landon, 799 F.2d 929, 932 (4th Cir. 1986) (assuming arguendo that witchcraft is a religion); Africa v. Pennsylvania, 662 F.2d 1025, 1036 (3d Cir. 1981) (holding that a group described by its founder as a revolutionary religious organization, does not qualify as a religion for free exercise purposes); Malnak v. Yogi, 592 F.2d 197, 199 (3d Cir. 1979) (per curiam) (holding that Transcendental Meditation is a religion for Establishment Clause purposes).

27. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6 (2d ed. 1988); Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579; George C. Freeman, III, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519 (1983); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233 (1989); Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805 (1978); Note, *Reinterpreting the Religion Clauses: Constitutional Construction and Conceptions of the Self*, 97 HARV. L. REV. 1468 (1984); Note, *supra* note 19, at 1083-89.

28. *See* JOHN CLARK ARCHER, FAITHS MEN LIVE BY 7-16 (1934); Gregory Baum, *Definitions of Religion in Sociology*, *in* WHAT IS RELIGION? AN ENQUIRY FOR CHRISTIAN THEOLOGY 25 (Mircea Eliade & David Tracy eds., 1980); HANS MOL, IDENTITY AND THE SACRED at ix-x (1976); ELIZABETH K. NOTTINGHAM, RELIGION: A SOCIOLOGICAL VIEW 6-8 (1971); PAUL TILLICH, THE SHAKING OF THE FOUNDATIONS 57 (1948) ("He who knows about depth knows about god."). The problem of defining religion, whether for theological or sociological purposes, is hardly a new one, and has perplexed distinguished thinkers. *See generally* AUGUSTE COMTE, A GENERAL VIEW OF POSITIVISM (J. H. Bridges trans., 1957); JOHN DEWEY, A COMMON FAITH (1934); ERICH FROMM, PSYCHOANALYSIS AND RELIGION (1950); IMMANUEL KANT, RELIGION WITHIN THE LIMITS OF REASON ALONE (Theodore M. Greene & Hoyt H. Hudson trans., 1934); MAX WEBER, THE SOCIOLOGY OF RELIGION (Ephraim Fischoff trans., 1963).

29. *See* Val D. Ricks, *To God God's, to Caesar Caesar's, and to Both the Defining of Religion*, 26 CREIGHTON L. REV. 1053, 1053 (1993) ("Either the federal constitutional definition of religion is of vital, continuing interest to the law, or someone is paying scholars a lot of money to write about it.").

sible "exercise." Implicitly acknowledging that "free exercise of religion" embodies a complex, compound right,[30] courts began in 1940 to accept the proposition that religion may not involve Judeo-Christian concepts of "god"—and may not even be theistic.[31] To contain the anarchic effect of such a construction, courts have focused on "exercise" to find that, in some cases, an exercise of religion would entitle the claimant to an exemption from generally applicable laws—but more often, it would not.

A. DEFINITIONAL EXERCISES

Although the Supreme Court has been reluctant to define religion, it has circled around the issue for over one hundred years. In *Davis v. Beason*, for example, the Court upheld an Idaho law that required electors to swear an oath that they were not polygamists.[32] Defending the required oath, Justice Field explained that "'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[33] The *Davis* definition therefore assumed the existence, and perhaps the form, of a "creator."[34] This understanding also assumed that the prevailing morality of "all civilized and Christian countries" should control the definition of religion.[35] By limiting the definition of religion to those recognized as Christian, the Court was able to prevent the anarchy that it believed would flow from a broader, more pluralistic definition.

Half a century later, the Court began to expand its definition of religion. In *United States v. Ballard*, the Court first recognized that the Free Exercise Clause compelled a broader

30. *See* McConnell, *supra* note 5, at 1114 ("The conclusion that the [Free Exercise C]lause protects conduct as well as speech or belief would seem to follow from its very words: 'exercise' means conduct.").

31. *See, e.g.*, *Seeger*, 380 U.S. at 166 (interpreting religion in a conscientious objector provision to include ideas other than an orthodox belief in God).

32. 133 U.S. 333, 346-48 (1890); *see also* Reynolds v. United States, 98 U.S. 145, 166-67 (1878) (upholding a bigamy conviction against a free exercise challenge).

33. *Davis*, 133 U.S. at 342.

34. The Framers of the Constitution probably shared similar views. James Madison, for example, characterized religion as "the duty which we owe to our creator, and the manner of discharging it." James Madison, *Memorial and Remonstrance on the Religious Rights of Man, in* CORNERSTONES OF RELIGIOUS FREEDOM IN AMERICA 84 (J. Blau ed., 1964), *quoted in* Note, *supra* note 19, at 1060 n.26.

35. *Davis*, 133 U.S. at 341.

definition of religion than was found in *Davis*.[36] The *Ballard* Court held that the "I Am" faith was entitled to constitutional protection, reasoning that religion "embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths."[37] This expansion continued in *Torcaso v. Watkins*, where the Court struck down a provision of the Maryland constitution that required officeholders to declare their belief in God.[38] The Court reasoned that such a provision favored one category of religions (theistic) over another (non-theistic) in violation of the Establishment Clause.[39] For the first time, the Court admitted the existence of non-theistic religions and extended First Amendment protection to their adherents.[40]

The broadest definition of religion appeared in the construction of a statute,[41] not the Free Exercise Clause. In *United States v. Seeger*, the Court held that "religion" included opposition to war based on "'belief in and devotion to goodness and virtue for their own sakes.'"[42] Drawing on modern theologians like Paul Tillich, the Court reasoned that religion included a "sincere and meaningful belief which occupie[d] in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."[43]

Courts have not been alone in attempting to define religion. Scholars, too, have struggled with the definitional problem. One recent approach[44] suggested that "[r]eligion should be used for constitutional purposes in the same way that it is used in everyday language and, further, that its meaning and appli-

36. United States v. Ballard, 322 U.S. 78, 86-87 (1944) (describing the diversity of protected religious beliefs).

37. *Id.* at 86.

38. 367 U.S. 488, 495-96 (1961) (stating that the government cannot constitutionally force people to profess a religious belief).

39. *See id.* at 489-90 (noting that the state of Maryland sided with those who believe in God).

40. *See id.* at 495 n.11 ("Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.")

41. *See* United States v. Seeger, 380 U.S. 163, 164 (1965) (citing Universal Military Training and Service Act, 50 U.S.C. app. § 456(j) (1958)).

42. *Id.* at 166 (quoting Seeger's letter to the draft board).

43. *Id.* at 176; *see also id.* at 180 (citing 2 PAUL TILLICH, SYSTEMATIC THEOLOGY 12 (1957)).

44. *See* Eduardo Peñalver, Note, *The Concept of Religion*, 107 YALE L.J. 791, 791-92 (1997).

cation are readily apparent."[45] A 1978 note in the *Harvard Law Review* advocated a functional definition that would treat "religion" like "speech," and protect the wide range of belief systems that constitute a person's "'ultimate concern.'"[46] Several scholars have rejected such a broad approach, and have instead proposed content-based definitions that attempt to capture the essential character of religion. Professor Jesse Choper, for example, has proposed a definition based upon the presence of a belief in "'extra-temporal consequences'" to human action.[47] Andrew Austin has proposed a definition based upon the presence of "faith."[48]

Still others suggest a different approach. George Freeman[49] and Kent Greenawalt,[50] have proposed a "methodology" derived from Wittgenstein's *Philosophical Investigations*:

> Consider for example the proceedings that we call "games". [sic] I mean board-games, card-games, ball-games, Olympic games and so on. What is common to them all?—Don't say: "There *must* be something common, or they would not be called 'games'"—but *look and see* whether there is anything common to all.—For if you look at them you will not see something that is common to *all*, but similarities, relationships, and a whole series of them at that . . . .
>
> . . . [T]he result of this examination is: we see a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail . . . . I can think of no better expression to characterize these similarities than "family resemblances."[51]

A "methodology" can also be criticized. Wittgenstein's approach offers no insight as to what constitutes a "family resemblance" to religion, or what the baseline activity would be. Nor is it

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45. *Id.* at 791-92. Some have argued that the Framers of the Constitution shared these assumptions. *See* ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY 90 (1990).

46. Note, *supra* note 19, at 1056. *But see* Choper, *supra* note 27, at 594-97 (criticizing this premise).

47. Choper, *supra* note 27, at 597-604.

48. *See* Andrew W. Austin, *Faith and the Constitutional Definition of Religion*, 22 CUMB. L. REV. 1, 33-43 (1991-1992).

49. *See* Freeman, *supra* note 27, at 1548 (stating that the attempt to define religion is "misconceived" and that there is no characteristic common to all religions that makes them "religious").

50. *See* Greenawalt, *supra* note 27, at 764 (proposing that the determination of a religion should be made by a comparison to that which is "indisputably religious").

51. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 66, at 31-32 (G.E.M. Anscombe trans., 2d ed. 1958).

clear how a court should "look and see" whether commonalties exist between one activity and another.[52]

At bottom, it is not clear *why* a court should take this, or any other, approach, when courts have frequently deferred—sometimes quite deeply—to the claim that an activity is a religious exercise. In other words, why should courts even bother to define religion if they can instead take claimants at their word?

B. DEFERENCE AS DEFINITION—THE INTERNAL AFFAIRS CASES

Courts and commentators rarely consider the effect that defining religion has on third parties. But the consequences of defining religion can be significant. If donating money and leasing real property are exercises of "religion," then persons harmed by religious actors engaged in those activities are not entitled to protection from generally applicable laws regulating the activities.[53] One definitional strategy is through the so-called "internal affairs" cases. These cases do not independently determine whether a dispute involves matters of religious import; instead they defer to the claims of the parties, presuming that disputes about, for example, the ownership of church property are in reality doctrinal conflicts.[54]

The deep deference of the internal affairs cases has roots in *Watson v. Jones*, an 1871 decision in which the Supreme Court held as a matter of federal common law that civil courts had no business making ecclesiastical decisions—they could not conduct "heresy" trials.[55] But the Court has also recognized two

52. *See* Peñalver, *supra* note 44, at 815. The author argues that in determining "family resemblances" among religions, judges should develop baselines "us[ing] in their analogical process . . . the existing set of religions in their diversity of belief and form." *Id.* at 817. This may help to avoid Judeo-Christian bias as currently constructed, but it still begs the questions of what composes the "existing set" of religions or religious exercise to begin with.

53. This would be so at least in the post-*Lochner* era, where the state is unrestricted by notions of "substantive due process." To the extent one believes *Lochner* is not dead, however, one may well ask whether (or to what extent) the government may regulate commercial activity. *See generally* Cass R. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873, 883-902 (1987) (arguing that numerous cases following *Lochner* rely on "*Lochner*-like" principles and that *Lochner* has not been completely overruled).

54. These cases are often called the "church property cases" because they frequently involve disputes over the disposition of church property. *See generally* Louis J. Sirico, Jr., *Church Property Disputes: Churches as Secular and Alien Institutions*, 55 FORDHAM L. REV. 335, 348-53 (1986) (describing the Court's deference test as used in the church property cases).

55. 80 U.S. (13 Wall.) 679, 728 (1871) ("The law knows no heresy.").

limited exceptions to the deference doctrine. Civil courts need not defer, and could instead delve (at least "marginally") into matters of religious doctrine, if they either relied on "neutral principles" in doing so,[56] or limited the inquiry to questions of fraud or collusion by the church.[57]

In one sense, deference is no more a method of defining religion than it is a method of resolving internal church disputes. Indeed, deep deference can be seen as the opposite of a method. It is judicial passivity. As such, the internal affairs cases form the most deferential node of the continuum of deference. While deep deference has been criticized,[58] it is not always inappropriate. Reflecting the anxiety of entanglement, the Supreme Court has noted more than once that "[t]he determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task."[59]

The delicacy of the definitional task appears to reflect at least two related concerns, one constitutional, the other institutional. The constitutional concern is the legitimate fear that the mere act of definition will "establish" a religion, or prefer one denomination to another.[60] If, for example, the *Davis* Court had the power to hold that polygamy was too outrageous a

56. Jones v. Wolf, 443 U.S. 595, 604 (1979).

57. *See* Gonzalez v. Archbishop, 280 U.S. 1, 16 (1929).

58. *See* Ingber, *supra* note 27, at 247-49; Alfred G. Killilea, *Standards for Expanding Freedom of Conscience*, 34 U. PITT. L. REV. 531, 538-41 (1972); Mary Harter Mitchell, *Secularism in Public Education: The Constitutional Issues*, 67 B.U. L. REV. 603, 631-33 (1987); Timothy L. Hall, Note, *The Sacred and the Profane: A First Amendment Definition of Religion*, 61 TEX. L. REV. 139, 160-161 (1982).

59. Thomas v. Review Bd. of the Indep. Employment Sec. Div., 450 U.S. 707, 714 (1981); *see also* United States v. Lee, 455 U.S. 252, 257 (1982) ("It is not within 'the judicial function and judicial competence' ... to determine whether [the Amish] or the Government has the proper interpretation of the Amish faith; '[c]ourts are not arbiters of scriptural interpretation.'" (quoting *Thomas*, 450 U.S. at 716)). The *Hernandez* Court contains a somewhat analogous line of thought, reasoning that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." Hernandez v. Commissioner, 490 U.S. 680, 699 (1989). The Court echoed this reasoning one year later. *See* Employment Div. v. Smith, 494 U.S. 872, 886-87 (1990) ("It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field.").

60. *See, e.g.*, Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

practice to be "a tenet of religion,"[61] it had, by implication, the power to do the opposite. Every disestablishment carries the potential for establishment.

At the institutional level, courts defer because they view themselves as lacking the expertise to define religion. This is understandable.[62] Judging the religious experiences of others cannot be easy. The anxiety of entanglement reflects this healthy reluctance. Moreover, to define "religion" as containing a certain set of practices and beliefs today risks excluding unpopular religions or unimagined religious practices in the future. To the extent we care about pluralism, in other words, defining religion can prove problematic. Yet, the failure to define religion is equally troubling. It is difficult to see how courts can protect something if they cannot define it. Furthermore, the absence of a definition creates, by negative implication, another sort of (less clearly articulated) definition.[63]

1. The Rule of Deference

The Supreme Court first applied the rule of deference in *Watson*, where the Court held as a matter of federal common law that civil courts had little role in resolving a dispute between a local church and its national parent organization.[64]

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61. Davis v. Beason, 133 U.S. 333, 341-42 (1890) ("To call their advocacy [of polygamy] a tenet of religion is to offend the common sense of all mankind.").

62. For instance, in *Welsh v. United States*, the Supreme Court struggled with the question of whether an ethical objection to war could be considered "religious." 398 U.S. 333, 340-44 (1970). Although the majority treated the question as one of statutory construction, Justice Harlan pointed out that the construction was severely strained and concurred on free exercise grounds. *See id.* at 344-67 (Harlan, J., concurring). The courts have considered whether certain beliefs or practices constitute a religion in other cases as well. *See, e.g.*, Africa v. Pennsylvania, 662 F.2d 1025, 1034 (3d Cir. 1981) (rejecting the claim that MOVE, described as a "revolutionary" organization "absolutely opposed to all that is wrong," is a religion); Founding Church of Scientology v. United States, 409 F.2d 1146, 1162 (D.C. Cir. 1969) (ruling after considerable discussion that Hubbard Electrometers, or "E-Meters," are parts of religious practice); United States. v. Kuch, 288 F. Supp. 439, 444-45 (D.D.C. 1968) (rejecting the claim that Neo-American Church, devoted to drug use, is a genuine religion); People v. Woody, 394 P.2d 813, 821 (Cal. 1964) (ruling that the use of peyote is a bona fide religious practice of the Native American Church); Fellowship of Humanity v. County of Alameda, 315 P.2d 394, 406 (Cal. 1957) (concluding after a lengthy analysis that the Fellowship of Humanity is a religion despite its lack of belief in a supreme being).

63. *See* Ricks, *supra* note 29, at 1061-64 ("[A] definition which did not exclude would not define.").

64. *See* Watson v. Jones, 80 U.S. (13 Wall.) 679, 727-29 (1871). Although

Watson nominally involved the disposition of the Walnut Street church building, in Louisville, Kentucky, but in fact turned on whether the abolitionist majority of the local church could wrest control of the church building from the pro-slave minority. The conflict arose in 1865, when the general church (i.e., the parent organization) adopted a resolution requiring members of the church to reject slavery.[65] When the pro-slavery minority of the Walnut Street church seized the building, the general church declared the anti-slavery majority to be the "true" church.[66] In the United States Supreme Court, the pro-slave minority argued that the church property was held in an "implied trust" in favor of the "doctrine" to which the property was devoted. Any departure from this doctrine entitled the adherents to the doctrine to claim the property as their own. Because the renunciation of slavery reflected a departure from Presbyterian doctrine as it existed at the time the Walnut Street church was founded, the minority claimed that it was the "true" church and that both the anti-slavery majority and the general church were usurpers.[67]

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the internal affairs cases have been described as "hoary," Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 959 (1989), modern examples of the basic problem abound. *See, e.g.*, Sara Kehaulani Goo, *Church and Diocese Battle Over Religion, Sex, Politics*, WALL ST. J., July 7, 1999, at NE1 ("Ever since St. Paul's Church began to break away from its mother religious affiliation, the Episcopal Diocese of Massachusetts, it has been a holy war."); Cindy Richards, *A Church Divided*, CHI. TRIB., May 13, 1999, § 2, at 1 ("What started out as an intramural flap over the proposed renovation of a historic church in Oak Park[, Illinois] is erupting into a battle over the separation of church and state . . . .").

65. *See Watson*, 80 U.S. (13 Wall.) at 691. The resolution required members who believed in the divine character of slavery to "repent and forsake these sins." *Id.* This presumably required the church members to sell their slaves.

66. *See id.* at 692. The majority sought to enforce its right to the church property in a diversity action in federal court. *See id.* at 694. The plaintiffs lived in Kentucky at the time they commenced the suit. The Court ruled that prior Kentucky state court decisions in favor of the pro-slavery minority did not preclude the federal courts' jurisdiction in the pending action because the prior state court decision, Watson v. Avery, 65 Ky. (2 Bush) 332 (1867), dealt only with the legitimacy of the defendants' election as church elders. *Watson*, 80 U.S. (13 Wall.) at 717. The circuit court granted the majority's request for an injunction, which the minority appealed to the U.S. Supreme Court. *See id.* at 699-700.

67. *See Watson*, 80 U.S. (13 Wall) at 691-92. One wonders why—or whether—support for slavery was an especially important element of Presbyterian doctrine prior to 1865.

The Supreme Court rejected the departure-from-doctrine rule, and declared that the members of the pro-slave minority were not the beneficiaries of an implied trust. As the *Watson* Court saw it, property disputes within a hierarchical church[68] can only be resolved by deference to the highest power within the church organization. "[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the [civil] legal tribunals must accept such decisions as final, and as binding on them . . . ."[69] This is the rule of deference—deference at its deepest.

Watson's rule of deference resembles a contractual test. "All who unite themselves" to a church "do so with an implied consent to [the church's] government, and are bound to submit to it."[70] Members of a church expect a religious "association's internal authority to act according to its own rules and in good faith."[71] Disappointing these expectations "breaches the understanding underlying the member-group relationship and gives the injured member a cause of action."[72] Under *Jones v. Wolf*, courts can only attempt "to ascertain and effectuate the private arrangements of affiliated churches."[73] In the Court's view, the "'peculiar genius'" of this "contractual rationale"[74] is that it "'reflect[s] the intentions of the parties.'"[75]

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68. A hierarchical church has a power structure similar to corporate parent and subsidiary relationships. Congregational churches, by contrast, have no such relationships. *See generally* Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 COLUM. L. REV. 1843, 1849-51 (1998) (describing the Court's treatment in *Watson* of the hierarchical church in contrast with non-hierarchical churches).

69. *Watson*, 80 U.S. (13 Wall.) at 727.

70. *Id.* at 729.

71. Sirico, *supra* note 54, at 352.

72. *Id.*

73. Arlin M. Adams & William R. Hanlon, Jones v. Wolf: *Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291, 1317 (1980) (discussing Jones v. Wolf, 443 U.S. 595 (1979)).

74. *Id.*

75. *Id.* (quoting Jones v. Wolf, 443 U.S. 595, 603 (1979)). The contractual basis of the rule of deference creates at least two problems. First, to the extent that the "locus of control" of the church is "ambiguous," a court would have to undertake the same "searching and therefore impermissible inquiry into church polity." Jones v. Wolf, 443 U.S. 595, 605 (1979) (quoting Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 723 (1976)). To say that church members impliedly consent to a particular polity assumes that courts can "ascertain" that polity without delving into "forbidden" doctrine. This as-

Contract principles do not, of course, completely explain the rule of deference.[76] The rule of deference implies that courts will inquire deeply enough to determine *whether* there was a contract, but not so far as to consider how to interpret the contract, or whether one party breached it. This may be troubling to some of us, because it gives great power to institutions that are unchecked by the state. Yet, no other alternative works. On this view, the answer for disgruntled church members is not recourse to civil courts, but to secede and form their own church.[77]

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sumption is ambitious, to say the least. Courts appear to have limited competence to make judgments about the nature of church polities. In the context of the same factual dispute the United Lutheran Church in America was first found to be synodical in character by a federal district court. *See* Evangelical Lutheran Synod v. First English Lutheran Church, 47 F. Supp. 954, 964 (W.D. Okla. 1942). After the district court was reversed on jurisdictional grounds by the Court of Appeals, *see* First English Lutheran Church v. Evangelical Lutheran Synod, 135 F.2d 701 (10th Cir. 1943), it was found by the Oklahoma Supreme Court to be congregational. *See* First English Lutheran Church v. Bloch, 159 P.2d 1006, 1006 (Okla. 1945). Compare *Duessel v. Proch*, 62 A. 152, 153 (Conn. 1905); *Dressen v. Brameier*, 9 N.W. 193, 193 (Iowa 1881); *Rock Dell Norwegian Evangelical Lutheran Congregation v. Mommsen*, 219 N.W. 88, 88-89 (Minn. 1928); *Mertz v. Schaeffer*, 271 S.W.2d 238, 241 (Mo. Ct. App. 1954); *Gudmundson v. Thingvalla Lutheran Church*, 150 N.W. 750, 750-02 (N.D. 1914); *Fadness v. Braunborg*, 41 N.W. 84, 85 (Wis. 1889), all finding the Lutheran Church to be congregational in policy, with *First English Evangelical Lutheran Church v. Dysinger*, 6 P.2d 522, 524 (Cal. Dist. Ct. App. 1931); *Wehmer v. Fokenga*, 78 N.W. 28, 29-30 (Neb. 1899); *Harmon v. Dreher*, 28 S.C.L. (1 Speers) 87, 91 (S.C. 1843), all finding the church to be hierarchical. Professor Greenawalt has argued that it may be appropriate to treat a church as hierarchical for certain purposes and as congregational for other purposes. *See* Greenawalt, *supra* note 68, at 1879.

Second, a contractual rationale implies contractual exceptions to enforcement. It is, for example, well understood that contracts should not be enforced when they result from fraud, mistake, unconscionably unequal bargaining power, and so on. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 159-185 (1979). Yet, courts using a strict rule of deference should not make these determinations, because these inquiries require a court to determine the existence or substance of the contract, and therefore, the substance of the church's governance. Such inquiries should theoretically be forbidden. Thus, even where church authorities act "arbitrarily" a court will grant no relief. *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 712-13 (1976); *see also infra* text accompanying notes 104-33.

76. Deference can also be explained on associational grounds, as in *Watson*, and on Establishment Clause grounds (i.e., taking a position in an internal church dispute would result in the impermissible establishment of a religion). *See* Watson v. Jones, 80 U.S. (13 Wall.) 679, 713-14 (1872). It is difficult to imagine a religious entanglement greater than declaring the legitimate bearer of a faith.

77. *See* Laycock, *supra* note 3, at 1403 ("If one is ill-treated by his church,

2. The Exceptions—Neutral Principles and Fraud or Collusion

If one views deference as the dominant civil court approach to internal church disputes, then there are two important, if limited, exceptions: (i) "neutral" principles, and (ii) fraud or collusion. Either model will permit a court to inquire, at least "marginally," into the substance of an otherwise internal church dispute. Both also suggest that deference correlates to contract principles. Under the neutral principles model, courts may view the contract as being embodied in the secular legal documents that govern the organization. The documents (*e.g.*, titles, charters, bylaws) will resolve the dispute, not the vote of the majority. Under the fraud or collusion exception, one could say that no contract was formed. The absence of the dissident parties' "assent" forecloses deep deference. Instead, where a party alleges fraud or collusion, a court will delve to some extent into the substance—including the doctrine—of seemingly internal church disputes. Implicit in this analysis is the prospect that disgruntled church members become third parties as they leave the church.

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he can leave it; if he feels bound by faith or conscience to stay in, the government can offer him no remedy."). Deference as a method of resolving internal church disputes also poses other, more general problems. It treats religion as "alien," as something that is beyond judicial experience or expertise. *See* Sirico, *supra* note 54, at 351, 353. Additionally, deference assumes that the religious component of disputes involving churches cannot be extracted from larger disputes involving the same claimants. How would *Watson* have come out, for example, if the organization in question was a non-religious group rather than a church? Would the Court still have permitted the local organization to defy the institutional hierarchy? Probably not. *See Watson*, 80 U.S. (13 Wall.) at 681. In fact, *Watson* presumed that because the disputants were religious—even though the dispute was of only marginally religious character—the whole matter was beyond the judicial ken. *See id.* It seems odd to say that the claimed religiosity of the disputants should govern the treatment of the dispute.

Deference will also tend to favor the powerful within a given group. Deference means that courts simply rubber stamp the decisions of the majority (in the case of a congregational church) or a higher decision-maker (in the case of a hierarchical church). Unless one of the exceptions discussed below applies, little inquiry may be made into the fairness or not of a particular policy or action. It is discomforting to acknowledge that courts must sometimes sanction otherwise intolerable results out of respect for larger institutional and constitutional principles. Yet such is the nature of deference.

a. Neutral Principles

The neutral principles exception engrafted a kind of parol evidence rule onto the deference test of *Watson*.[78] Courts can, under the neutral principles test, resolve disputes about church property *either* by deferring to the decisions of the church polity (presumed to be majority rule) *or* by analyzing only the documents and instruments that reflect the intentions of the parties. The "formal title" version of the neutral principles doctrine permits courts to determine ownership "by studying deeds, reverter clauses, and general state corporation laws."[79] Neutral principles assume that the parties have agreed to be bound by these formal documents and not by extrinsic writings, words, or conduct.[80]

The Court first applied neutral principles in *Jones v. Wolf*.[81] The dispute in *Wolf* centered on the disposition of the property of the Vineville Presbyterian Church (Vineville Church), in Macon, Georgia, which had been incorporated in 1915. The Vineville Church, by its trustees, acquired three parcels of real property (Vineville Property) with the proceeds of contributions by church members. The Vineville Property was deeded in the name of the Vineville Church, which was a member of the Augusta-Macon Presbytery of the Presbyterian Church in the United States (PCUS).[82] Being a "hierarchical" church, the local churches (e.g., the Vineville Church) were self-

78. *See* 80 U.S. (13 Wall.) at 733-35. Justice Powell's thoughtful dissent in *Jones v. Wolf* characterized the test as a "restrictive rule of evidence." 443 U.S. 595, 611 (Powell, J., dissenting).

79. Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 370 (1970) (Brennan, J., concurring). Exactly which documents are open to examination under the doctrine is unclear. Colorado courts, for example, have examined internal church organizational documents in applying the formal title test. *See* Bishop & Diocese v. Mote, 668 P.2d 948, 952-53 (Colo. Ct. App. 1983), *rev'd en banc*, 716 P.2d 85 (Colo. 1986); Bernson v. Koch, 534 P.2d 334, 338-39 (Colo. Ct. App. 1975); *see also* Sirico, *supra* note 54, at 356.

80. Prior to the application of the neutral principles doctrine, the Court would presumably have deferred to the decision of the highest church authority. *See, e.g.*, Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 17 (1929) (holding that the archbishop had sole authority to interpret provisions of a will creating chaplaincy); Bouldin v. Alexander, 82 U.S. (15 Wall.) 131, 139-40 (1872) (holding that the will of the majority of the members, not minutes of the church meeting, determines outcome).

81. 443 U.S. 595, 599-601 (1979).

82. *See id.* at 597.

governing in the first instance, subject to the "review and control" of higher order church courts within the PCUS.[83]

In 1973, a majority of members of the Vineville Church, including the pastor, elected to leave PCUS and join another denomination, the Presbyterian Church of America. The majority faction apparently retained the Vineville Property; the minority remained officially on the roles of the Vineville Church but, in fact, ceased to participate in its affairs.[84] The PCUS appointed a commission to investigate and, if possible, to resolve the schism. The PCUS commission ultimately ruled that the minority faction was the "'true congregation'" of the Vineville Church and withdrew from the majority faction "'all authority to exercise office derived from the [PCUS].'"[85] The majority faction apparently took no part in the inquiry.

Following the PCUS's ruling, members of the minority faction sued in state court seeking a declaration that they had the right to "exclusive possession and use" of the Vineville Property as members of the PCUS.[86] Applying what it characterized as Georgia's version of "neutral principles of law," the trial court, affirmed by the Supreme Court of Georgia, held for the *majority*, denying that the minority had rights in the Vineville Property.[87] According to the Georgia court, "neutral principles" required it to examine deeds to the Vineville Property, state statutes dealing with implied trusts under Georgia law, *and* the "Book of the Church Order" (the constitution of the PCUS) to determine whether there was any basis for finding a trust in favor of the PCUS.[88] After undertaking such a review, the Georgia court concluded that the Vineville Property was deeded in the name of the Vineville Church, and that neither the statute, the Vineville Church's charter, nor the Book of the Church Order created an implied trust in favor of the PCUS.[89] The Georgia court concluded that, because none of these documents created such a trust, the Vineville Property followed the deed—the "neutral" legal document—and belonged to the Vineville

83. *Id.* at 598.
84. *See id.*
85. *Id.* at 598 (quoting Appellate Record at 235).
86. *Id.*
87. *Id.* at 599.
88. *Id.* at 600.
89. *See id.* at 601 (citing App. to Pet. for Cert. 9a; 243 S.E.2d 860, 864 (Ga. 1978)).

Church, as determined by the will of the majority of the church's members, not the PCUS.[90]

After granting certiorari,[91] the United States Supreme Court began its analysis by noting that the "First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes."[92] Justice Blackmun, writing for five Justices, therefore reasoned that the First Amendment requires civil courts to "defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization."[93] Subject to that general limitation, however, courts would be free to "adopt *any* one of various approaches for settling church property disputes so long as [the method used] ... involves no consideration of doctrinal matters ...."[94]

One of these approaches—"neutral principles"—could "in [a] general outline"[95] be consistent with the overarching rule of deference. Neutral principles would not require complete judicial deference. Instead, courts could consider, and resolve internal church disputes using, "objective, well-established concepts of trust and property law familiar to lawyers and judges."[96] According to the Court, the neutral principles test permits a court to ascertain the holder of legal title to property by interpreting and applying "secular" provisions of the church's governing documents.[97] Subject to certain limitations, Georgia's version of neutral principles—examining deeds to the Vineville Property, state statutes dealing with implied trusts under Georgia law—was acceptable if Georgia recognized a "presumptive rule of majority representation, defeasible upon a showing that the identity of the local church is to be determined by some other means."[98] The Constitution would not, however, permit state courts to rely on any religious docu-

90. *See id.* at 600 (citing Presbyterian Church v. Eastern Heights Church, 167 S.E.2d 658, 660 (Ga. 1969)).

91. *See* Jones v. Wolf, 439 U.S. 891 (1978).

92. *Jones*, 443 U.S. at 602 (quoting Presbyterian Church v. Hull Church, 393 U.S. 440, 449 (1969)).

93. *Id.* (citations omitted).

94. *Id.* (quoting Maryland & Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 368 (1970)) (Brennan, J., concurring).

95. *Id.*

96. *Id.* at 603.

97. *See id.* at 599-604.

98. *Id.* at 607.

ments, such as the Book of Church Order. To do so "would appear to require a civil court to pass on questions of religious doctrine."[99]

Here, the Supreme Court appeared to think the reasoning of the Georgia courts incomplete. "Neither the trial court nor the Supreme Court of Georgia . . . explicitly stated that it was adopting a presumptive rule of majority representation."[100] Because the Court "does not declare what the law of Georgia is,"[101] it remanded the cause for further consideration. In other words, the Georgia Supreme Court was not wrong in usurping the PCUS; it simply had to show that there was a constitutionally legitimate basis in state law for doing so. The Georgia court could not base its decision on church doctrine. It would have to use neutral principles or none at all.[102]

It is not clear what the Court intended or accomplished in *Wolf*.[103] *Wolf* drained the deference rule of some of its force by holding that neutral legal documents can control over the will of the highest church polity. Yet, it did not necessarily undercut the larger contractual rationale of the older rule. Indeed, if contract principles describe the boundary between churches and third parties, one could view the neutral principles doctrine as a kind of parol evidence rule applicable solely to internal religious disputes. Deference—judicial passivity—is constitutionally compelled unless one side in an internal or doctrinal church dispute can point to secular documents that should govern the dispute. If such documents embody the "contract" between the church and its members at a particular time, then acting contrary to such documents strips one side in the dispute of its "assent" as reflected in those documents. The aggrieved party becomes, in some sense, a "third party." Stated another

99. *Id.* at 609 (footnote omitted). The distinction between "neutral" legal documents, which courts may review, and documents of "doctrine," which are forbidden to courts, is unclear. The Book of the Church Order, for example, appears to have had elements of both. *See id.* Indeed, every "legal" document will imply elements of doctrine. They will, for example, reflect the religious views of a particular group within a church at a particular time. It is strange to say that any document involving transactions among church members could be "secular" (and therefore "neutral"). While such documents may appear secular, and therefore neutral, they must reflect the intentions of their authors and signatories. They would otherwise be largely incoherent.

100. *Id.* at 608.

101. *Id.* at 609.

102. *See id.*

103. *See* Greenawalt, *supra* note 68, at 1844 n.3.

way, deference declines in proportion to the presence of third parties.

b. Fraud or Collusion

Deference may also be limited where a party claims to be the victim of "fraud" or "collusion."[104] As with the neutral principles exception to deep deference, contractual principles and concern for third parties may explain the increased judicial scrutiny found in the fraud and collusion exception. This exception was first announced as dicta in *Gonzalez v. Roman Catholic Archbishop*.[105] In *Gonzalez*, the Supreme Court affirmed a decision of the Philippine Supreme Court that dismissed a complaint challenging the refusal of the Catholic Church to appoint the petitioner to a chaplaincy.[106] The chaplaincy in question was tied to a gift under a will. The heir claimed that pursuant to the terms of the gift, he was entitled to be made a collative chaplain. The archbishop made the petitioner a laical chaplain, which was not satisfactory to the petitioner.[107]

The Supreme Court reasoned that "it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them."[108] This would have been consistent with the general rule of deep deference to internal church workings announced in *Watson*. But *Gonzalez* went further. "In the *absence* of fraud, collusion, or arbitrariness," Justice Brandeis wrote, "the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation . . . because the parties in interest made them so *by contract or otherwise*."[109]

Gonzalez therefore opened the door to "'marginal civil court review'" to determine whether ecclesiastical decisions were the

104. *See Jones*, 443 U.S. at 609 n.8 (quoting Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976)).

105. 280 U.S. 1, 16 (1929).

106. *See id.* at 1-2.

107. *See id.* at 5.

108. *Id.* at 16.

109. *Id.* (emphasis added). One would assume there was no breach of contract claim here both because the transaction was a "gift" and because the heir was a third party beneficiary not in being at the time the gift was made. Even if petitioner had asserted a breach of contract (or similar) claim, the Court's reluctance to consider doctrine would suggest that it would not have passed on the substantive terms of the agreement.

product of "'fraud, collusion or arbitrariness.'"[110] The breadth of this exception is unclear. In *Serbian E. Orthodox Diocese v. Milivojevich*, the Court concluded that this exception to the deference rule was "dictum only."[111] *Milivojevich* also excised "arbitrariness" from the exception,[112] properly recognizing that judicial analysis of "arbitrariness" "must inherently entail inquiry into procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow."[113] Yet it is not clear why *Milivojevich* did not go on to eliminate the "fraud" and "collusion" exceptions to the deference rule enunciated in *Gonzalez*. What distinction can courts make for this purpose between "arbitrariness," on the one hand, and "fraud" or "collusion," on the other? In any of these cases, a court will have to delve into forbidden doctrine.

The answer may depend, in part, on whether the fraud is religious or secular in nature, a distinction first drawn in *United States v. Ballard*.[114] In that case, the Ballards were indicted for conspiring to use the United States mails to commit fraud.[115] The charge alleged that the Ballards formed corporations, sold literature, raised funds and sold "memberships" in the "I Am" movement. Guy Ballard claimed he had been selected as a "'divine messenger'" and that, "'by reason of supernatural attainments, [he had] the power to heal persons of ailments and diseases.'"[116] The United States alleged that Ballard "'well knew'" these representations were false "'and [that they] were made with the intention . . . to cheat, wrong, and defraud persons . . . and to obtain . . . money, property, and other things of value and to convert the same to the use and the benefit of

110. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 712 (1976) (quoting Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 447 (1969)).

111. *Id.*

112. *Id.* at 713.

> [N]o "arbitrariness" exception—in the sense of any inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations—is consistent with the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization . . . .

Id.

113. *Id.*

114. 322 U.S. 78 (1944).

115. *See id.* at 79.

116. *Id.* at 80 (quoting the record, no citation provided).

the defendants . . . .'"[117] The defendants demurred, claiming that the indictment attacked their religious beliefs "and sought to restrict the free exercise of their religion."[118]

The defendants and the prosecution agreed that the jury question should be limited to whether the defendants "'honestly and in good faith believe[d]'" their representations.[119] "'If these defendants did not believe those things, they did not believe that Jesus came down and dictated [to them] . . . but used the mail for the purpose of getting money, the jury should find them guilty.'"[120] After the jury returned a guilty verdict, the defendants sought a new trial, claiming that withdrawing the related question of the truth of these representations effectively amended the indictment in violation of due process. The new trial motion was denied. The Court of Appeals for the Ninth Circuit reversed, concluding that the district court should not have restricted the question to that of the "good faith" of the defendants.[121] Instead, the jury should have considered whether the United States proved that "'some, at least, of the representations which [the defendants] schemed to make were false.'"[122] The truth or falsity of these religious representations should have formed the basis of the conviction, according to the court.

The Supreme Court disagreed. The "truth or verity" of the defendants' religious doctrines or beliefs should not have been submitted to the jury.[123] Citing *Watson*, Justice Douglas reasoned that "'[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.'"[124] No civil court could pass on the verity of the Ballards' claims because "[m]en may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."[125] The Court therefore reversed and remanded the case to the court of appeals to "pass on the questions reserved."[126]

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117. *Id.* (quoting the record, no citation provided).

118. *Id.* at 81.

119. *Id.* (quoting the record, no citation provided).

120. *Id.* at 81-82 (quoting the record, no citation provided). It is not clear why defendants' "honest" belief mattered. Presumably, scienter was an element of the claim.

121. *Id.* at 83 (citing Ballard v. United States, 138 F.2d 540 (1944)).

122. *Id.* (quoting *Ballard*, 138 F.2d at 545).

123. *Id.* at 86.

124. *Id.* (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1871)).

125. *Id.*

126. *Id.* at 88 (citing Lutcher & Moore Lumber Co. v. Knight, 217 U.S. 257, 267-68 (1910); Brown v. Fletcher, 237 U.S. 583 (1915)). The *Ballard* Court

Two dissenting opinions argued in opposite directions. One, from Justice Stone, claimed that the Constitution does not "afford[] immunity from criminal prosecution for the fraudulent procurement of money by false statements as to one's religious experiences"[127] The other, by Justice Jackson, argued that the indictment should have been dismissed in its entirety. "The chief wrong which false prophets do to their following is not financial," he argued, but is "on the mental and spiritual plane."[128] Yet courts have no role in redressing such harm, because prosecutions of this character "could easily degenerate into religious persecution."[129]

Ballard distinguished religious fraud from secular fraud.[130] Douglas's majority opinion construed the Ballards' representations as being religious in nature, and therefore beyond the judicial ken. Justice Jackson's dissent agreed on that point, but argued that the stopping point should come with secular fraud. According to Justice Jackson, "making false representations on matters other than faith or experience"[131] could be grounds for prosecution. Thus, Justice Jackson reasoned, "if one represents that funds are being used to construct a church when in fact they are being used for personal purposes,"[132] one should be subject to prosecution.

The difference between religious and secular fraud is not entirely clear, but the nature of the claims made and the avail-

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appeared to be motivated at least partly by the effect affirmance could have had on minority religions:

> If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which men could agree .... The religious views espoused by [the defendants] might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect.

Id. at 87. It is not clear how prosecutions for fraud would necessarily result in the persecution of minority religions. The state could clearly prosecute fraud in solicitation. *Ballard* appears to stand for the proposition that it could not do so where the basic representations were religious in nature.

127. *Id.* at 88-89.

128. *Id.* at 94 (Jackson, J., dissenting).

129. *Id.* at 93-95.

130. *See* Jonathan Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73 YALE L.J. 593, 607 (1964).

131. *Ballard*, 322 U.S. at 93-95 (Jackson, J., dissenting).

132. *Id.* at 95.

ability of a judicial remedy help draw the distinction.[133] Fraud would be religious in character if it were beyond the power of a court to redress. The constitutional and institutional impediments to defining religion—the anxiety of entanglement—prevent judges from determining the truth of the Ballards' claims. How could a civil court determine, much less remedy, heresy or false prophecy? The answer may lie in concern for third parties. If the rule of deference rests on a contractual understanding of the relationship between a church and its members, it follows that one who is "fraudulently" induced to join a church is not, in fact, a member of that church. Perhaps fraud, and its sibling collusion, remain a basis for civil court intervention precisely because fraud, like the "neutral principles" doctrine, converts dissenting adherents into third parties.

C. THE CONTINUUM OF DEFERENCE—DISTINGUISHING RELIGIOUS AND COMMERCIAL CONDUCT

The internal affairs cases form one end of the continuum of deference. The deep deference of these cases is an acceptable means of defining religion, in part, because third parties would not be affected by treating what appear to be disputes about property disposition or corporation structure as doctrinal matters beyond judicial remedy. Yet, the Court has not deferred deeply to claims that conduct is a religious exercise where third parties would be harmed. Rather, the continuum of deference suggests that deference declines, and judicial scrutiny increases, in proportion to the likelihood of third-party harm. At the least deferential end of the continuum, the Court independ-

133. The distinction between religious and secular fraud appears to have played an important role in a recent case. *See* United States v. Lilly, 37 F.3d 1222, 1226 (7th Cir. 1994). There, the U.S. Court of Appeals for the Seventh Circuit held that religious actors could be prosecuted for fraudulent solicitation where the fraud involved misrepresentations about the use of solicited funds. *See id.* Distinguishing the internal affairs cases, the Seventh Circuit reasoned that:

> Pastor's Lilly's offense pertained solely to the way in which [the Pastor] procured the "church" funds in the first place. Pastor Lilly obtained the money by, among other things, making fraudulent misrepresentations and omissions of material fact in the sale of the Certificates of Deposit .... Pastor Lilly was convicted not because the government or the court decided that the Church had spent its money unwisely, but because Pastor Lilly did not spend the [solicited funds] in the way that he promised the investors he would, and because he lied to the investors about their ability to recover their investment principal upon certificate maturity.

Id.

ently scrutinizes the claim of exemption in what can be called a transactional analysis.[134] Cases most frequently appearing at this end of the continuum involve the overlap of the seemingly disparate worlds of religion and commerce, where churches seek competitive, tax or other "commercial" advantages not available to secular citizens or groups engaged in the same conduct. In most of these cases, the Court has not deferred to the claim of religious exercise, but instead independently characterized the transaction that occurred as, for example, a taxable sale or an employment relationship.[135]

The distinction between religion and commerce is not always easy to make.[136] Churches borrow money for their own undertakings, such as building repairs, and to support church-related activities, such as low income housing projects.[137] Priests have been known to moonlight as real estate developers.[138] The National Association of Church Food Service, Inc., in Atlanta recently reported that its membership had grown ten-fold (to 200 member churches) between 1990 and 1998 as more churches offer a location to hold wedding receptions, funerals and lunches.[139] St. Bartholomew's Church in mid-town

134. *See* Jonathan C. Lipson, *First Principles and Fair Consideration: The Developing Clash Between the First Amendment and the Constructive Fraudulent Conveyance Laws*, 52 U. MIAMI L. REV. 247, 280-81 (1997).

135. *See, e.g.*, Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 295 (1985). Discussions about what constitutes a religious "exercise" frequently collapse into discussions about the nature of the "burden" on exercise. *See generally* Lupu, *supra* note 64 (discussing the "character of government activity necessary to constitute a 'burden'"). In this way, courts tend to define religion in relation to the "burden" imposed. But focusing on burdens rather than the underlying activity is simply another form of deference. How does a court know whether a law burdens the free exercise of religion if it does not know what forms the "religion" part of the analysis?

136. Of course, even if a court concludes that an activity is both religious and commercial, an exemption from a generally applicable law may be appropriate. *See* Attorney General v. Desilets, 636 N.E.2d 233, 238 (Mass. 1994) ("The fact that the defendants' [landlords'] free exercise of religion claim arises in a commercial context, although relevant when engaging in a balancing of interests, does not mean that their constitutional rights are not substantially burdened.").

137. *See* Leslie Eaton, *Banks Put Their Faith in Building Churches*, N.Y. TIMES, Jan. 10, 1999, § 1, at 19; Stephen A. Kliment, *When Places of the Spirit Face Concrete Realities*, N.Y. TIMES, Dec. 27, 1998, § 11, at 1; *see also It's Better if You're White*, ECONOMIST, Feb. 27, 1999, at 28 (discussing church-sponsored mammography programs in South-Central Los Angeles).

138. *See* John Ellement & Richard S. Kindleberger, *Cleric Seeks to Balance Secular Avocation*, BOSTON GLOBE, Dec. 19, 1998, at B1.

139. *See Business Bulletin*, WALL ST. J., Oct. 15, 1998, at A1.

Manhattan feeds both the poor and, from its Cafe St. Bart, the not-so-poor.[140] Churches increasingly give "premiums" such as Super Bowl tickets to lure rich donors.[141] Churches and synagogues are increasingly being viewed as social centers;[142] religious themes are pop culture memes.[143] And because "rent is more reliable than the collection plate,"[144] churches throughout the nation are leasing spire space to telecommunications companies. It would be difficult to say in any but the broadest sense that all of these activities are religious exercises.[145]

At least on the basis of current precedent, it appears that the Supreme Court would agree. The case that most closely considered the question—and that forms the least deferential end of the continuum—is *Tony and Susan Alamo Foundation v. Secretary of Labor*,[146] where the Court held that a church that ran "commercial" businesses was bound by the minimum wage and reporting requirements of the Fair Labor Standards Act (FLSA).[147] Despite the religious mission of the organization, granting a free exercise exemption would give an intolerable competitive advantage to the church. Deferring not to the peti-

140. *See id.* St. Bartholomew's Church has also been the subject of an important religious-use case involving its buildings. In 1990, the Second Circuit Court of Appeals held that the church was not entitled to an exemption from New York's landmark's preservation statute in order to build an office tower where its "historic" community house stood. *See* St. Bartholomew's Church v. City of New York, 914 F.2d 348, 359-60 (2d Cir. 1990).

141. *See* Lisa Miller, *Religious Institutions Are Invoking Premiums to Inspire the Wealthy*, WALL ST. J., Mar. 10, 1999, at A1.

142. *See* Monica P. Yazigi, *The New Social Church*, N.Y. TIMES, Nov. 1, 1998, § 9, at 1.

143. *See* Joan Anderson, *Heaven Can Wait: In Pop, the spiritual is soaring*, BOSTON GLOBE, Nov. 8, 1998, at L1. "Loosely speaking, a meme is an element of culture: a word, a song, an attitude, a religious belief, a mealtime ritual, a technology." Robert Wright, *You Can Copy Off Me*, N.Y. TIMES BOOK REV., Apr. 25, 1999, at 12 (reviewing SUSAN BLACKMORE, THE MEME MACHINE (1999)).

144. Jon G. Auerbach, *Holy Toll Calls: Telecom Companies Now Turn to Heaven*, WALL ST. J., Dec. 23 1997, at A1.

145. *Compare* Laycock, *supra* note 3, at 1390 ("Any activity engaged in by a church as a body is an exercise of religion." (footnote omitted)), *with id.* at 1409 ("Even so, [a church's] interest in conducting a worship service is clearly greater than its interest in organizing a trip to a baseball game for the church men's club."). While the distinction Professor Laycock makes has an intuitive appeal, it does not answer the analytically prior questions: (i) who gets to make the distinction, a church or a civil court? and, (ii) does activity that potentially harms third parties change the analysis?

146. 471 U.S. 290 (1985).

147. *See id.* at 304-06; *see also* 29 U.S.C. §§ 201-219 (1994).

tioners' characterization of the transaction, but instead to the "objectively ascertainable facts" adduced by the lower courts, the Court reasoned that the religious claimants' service stations, retailing clothing and grocery outlets, hog farms, roofing and electrical construction companies and other businesses[148] (i) "serve[d] the general public," and (ii) "compet[ed]" with "ordinary commercial enterprises."[149] These activities, the Court held, were not exercises of religion.[150]

The *Alamo* Court appears to have based its conclusion on concern for third parties. Without an obligation to pay a minimum wage, the Court reasoned that the Foundation enjoyed a competitive advantage over "ordinary commercial enterprises" that were so obligated.[151] The FLSA, the Court reasoned, forbade "exactly this kind of 'unfair . . . competition.'"[152] While the *Alamo* Court did not explicitly say that it would scrutinize a claim of religious exercise more closely when the result would be third-party harm, it is easy to see such a relationship. Thus, *Alamo* was far less deferential to the claimants in that case than was the Court in *United States v. Lee*.[153]

In *Lee*, the Court declined to exempt Amish farmers from participation in the social security system, reasoning that if one "enter[s] into commercial activity as a matter of choice," one's religious beliefs "are not to be superimposed on the statutory schemes which are binding on others in the activity."[154] Yet, it appears that *Lee* did consider the refusal to participate in the social security system an exercise of religion. Indeed, the *Lee* Court deferred deeply, reasoning that "[i]t is not within 'the judicial function and judicial competence' . . . to determine whether [the Amish] or the Government has the proper interpretation of the Amish faith; '[c]ourts are not arbiters of scriptural interpretation.'"[155]

148. *Alamo*, 471 U.S. at 292, 299.

149. *Id.* at 299 (citing Donovan v. Tony & Susan Alamo Found., 567 F. Supp. 556, 573 (W.D. Ark. 1982); Donovan v. Tony & Susan Alamo Found., 722 F.2d 397, 400 (8th Cir. 1983)).

150. *See id.*

151. *Id.* at 299.

152. *Id.* (quoting 29 U.S.C. § 202(a)(3)).

153. 455 U.S. 252, 254-55 (1982).

154. *Id.* at 261.

155. *Id.* at 257. (quoting Thomas v. Review Bd. of Indep. Employment Sec. Div., 450 U.S. 707, 716 (1981)); *see also* Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 137 (1987) (deferring to claim that refusal to work on Sabbath is religious exercise).

Perhaps the different approaches of *Alamo* and *Lee* reflect the Court's concern for third parties. While identifiable, private individuals engaged in, and were harmed by, the same "businesses" as those run by the *Alamo* claimants, no comparable third parties could be identified in *Lee*. The social security system does not implicate identifiable third parties, but all (or most) United States citizens. Like the police power generally, the state is not seeking to protect private rights or prevent discrete or identifiable harms.

The attempt to distinguish religion from commerce shows how the continuum of deference protects third parties from harm by religious exercise.[156] Thus, in *Braunfeld v. Brown*, for example, the Court refused to void Sunday closing laws as excessively burdensome to Jews, who were forced to close for two days rather than one because they observe Sabbath on Saturday.[157] *Braunfeld* granted no exemption to Saturday Sabbatarian Jews because, the Court reasoned, "the Sunday law simply regulates a *secular* activity and . . . does not inconvenience all members of the Orthodox Jewish faith but only those who believe it necessary to work on Sunday."[158] Rather than defer, the Court engaged in a transactional analysis. The competitive advantage that Saturday Sabbatarians would enjoy by opening on Sunday, while others were closed, seemed to the Court an intolerable level of harm to third parties.[159] Perhaps

156. The continuum appears outside the commercial context, as well. In *Smith*, for example, the Court appears to have deferred deeply to the claim that smoking peyote was a religious exercise. The *Smith* Court initially remanded the case to the Supreme Court of Oregon to determine, in part, whether smoking peyote was a religious exercise that violated Oregon's criminal law. *See* Employment Div. v. Smith, 485 U.S. 660, 673-74 (1988). On remand, the Oregon Supreme Court engaged in a fairly thorough analysis of peyote religions, and concluded that the activity was, indeed, a religious exercise. *See* Smith v. Employment Div., 763 P.2d 146, 148 (Or. 1988). Back in the Supreme Court, it appears that Justice Scalia did not challenge the Oregon court's analysis. *See* Employment Div. v. Smith, 494 U.S. 872, 876 (1990). This would be logical if one recognizes a continuum of deference, since it would appear that smoking peyote, even if illegal, posed little likelihood of third-party harm. The analysis would likely differ if, instead, the claimants sought to use a controlled substance that was considered a threat to public welfare, e.g., cocaine, heroin, etc. *Compare* United States v. Kuch, 288 F. Supp. 439, 444-45 (D.D.C. 1968) (rejecting a claim that the Neo-American Church, devoted to drug use, is a genuine religion), *with* People v. Woody, 394 P.2d 813, 821-22 (Cal. 1964) (ruling that the use of peyote is a bona fide religious practice of the Native American Church).

157. 366 U.S. 599, 601, 609 (1961).

158. *Id.* at 605 (emphasis added).

159. *See id.* at 608-09.

this concern led the Court to scrutinize the activity in question independently, and to conclude that it was secular rather than religious.

Similarly, the religion and tax cases, where the government is a creditor, and thus much like a private third party, find the Court engaged in an independent analysis of the transactions in question. In *Hernandez v. Commissioner*[160] for example, the Court determined that contributions to the Church of Scientology for "auditing" and training sessions[161] were not deductible under § 170 of the Internal Revenue Code. Similarly, in *Jimmy Swaggart Ministries v. Board of Equalization*, the Court held that California's sales and use tax was constitutional even as applied to sales of religious items by a recognized church.[162] California's "sales and use tax is not a tax on the right to disseminate religious information .... [R]ather, it is a tax on the privilege of making retail sales of tangible personal property ... in California."[163]

The transactional approach does not always result in denial of a religious exemption. The *Murdock v. Pennsylvania*[164] and *Follett v. McCormick*[165] decisions held that the "sale" of religious pamphlets by evangelists was a form of "preaching" exempt from certain regulations.[166] Yet the Court in these cases did not defer blindly to the claim that the activities were religious exercises. In *Murdock*, the Court discussed at length the religious history and significance of door-to-door evangelism. Here, "spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations" was seen as "an age-old type of evangelism with as high a claim to constitutional protection as the more or-

160. 490 U.S. 680 (1989), *aff'g* Hernandez v. Commissioner, 819 F.2d 1212 (1st Cir. 1987), *and* Graham v. Commissioner, 822 F.2d 844 (9th Cir. 1987). It is admittedly less than clear that the government as taxing authority is a "third party" akin to the "ordinary commercial businesses" at issue in *Alamo*. Nevertheless, it is clear that, as taxing authority, the government shares many qualities with other commercial actors, primarily as a creditor asserting claims against the religious debtor. In this sense, the government is not acting in its police power in the abstract, but as a third party seeking payment.

161. *Hernandez*, 490 U.S. at 685. According to the Court, "auditing" is the process in Scientology by which a person becomes aware of his or her immortal spiritual dimension. *Id.* at 684.

162. 493 U.S. 378, 389-90 (1990).

163. *Id.* at 389.

164. 319 U.S. 105 (1943).

165. 321 U.S. 573 (1944).

166. *Follett*, 321 U.S. at 577; *Murdock*, 319 U.S. at 109.

thodox types."[167] In *Follett*, the Court extended the *Murdock* holding to non-itinerant door-to-door solicitors. While these decisions fail to explain how the "religious" component outstripped the "sale" component, the Court as a matter of method appeared unwilling to defer deeply to the claim that the activity was a religious exercise.[168]

The continuum of deference is not a perfect model. There are certainly exceptions, including *Reynolds* and *Davis*, which appear to flout it.[169] Those cases resolutely, if narrowly, define religion to exclude plural marriage from the umbrella of constitutional protection. They are hardly deferential. Yet it is not clear who would have been harmed by an exemption in those

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167. *Murdock*, 319 U.S. at 110.

168. *Id.* at 109 (noting that the activity was "more than preaching . . . more than distribution of religious literature. It is a combination of both"); *cf. Follett*, 321 U.S. at 576 ("We must [] accept as *bona fide* appellant's assertion that he was 'preaching the gospel' by going 'from house to house presenting the gospel of the kingdom in printed form.'").

The *Murdock* Court acknowledged that "[s]ituations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial." 319 U.S. at 110. Although the Court characterized this distinction as "vital," *id.*, it offered little guidance as to how to make it. Relying on biblical references, *id.* at 108 (quoting *Acts* 20:20 and *Mark* 16:15), and analogies to "more orthodox" types of religions, *id.* at 110, the Court essentially took the view that, whatever else may or may not be "religious" exercise, "it plainly cannot be said that petitioners were engaged in a commercial rather than a religious venture." *Id.* at 111. It would appear that, in fact, the distinction between the "religious" and the "commercial" was not "vital" because, less than a generation later, in *Swaggart*, the Court concluded that *Murdock* and *Follett* turned on the prior restraint caused by the state's laws involved in those earlier cases. Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 385-92 (1990) (holding that the levying and collection of generally applicable sales and use taxes imposed no constitutionally significant burden on the appellants (evangelists)). Although the problem of prior restraints is beyond the scope of this Article, it would appear that judicial discomfort with prior restraints is, like concern for third-party harm, one of several constitutional values that courts consider when approaching the definitional question.

169. *See* Davis v. Beason, 133 U.S. 333, 347-48 (1890) (upholding a law requiring Mormons to swear that they were not polygamists); Reynolds v. United States, 98 U.S. 145, 166-68 (1878) (upholding a conviction for polygamy). Another interesting example, which produced a very different result, is the *Lukumi* case, where the Court struck down a municipal ordinance intended to stop members of the Santeria faith from sacrificing animals, as required by their faith. *See* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 547 (1993). The *Lukumi* case contains a thoughtful and thorough discussion of the role of animal sacrifice in a variety of religions. *See id.* at 524-30. Unless one believes animals should be treated as third parties in the religious liberty context, it is difficult to see how anyone in Hialeah, Florida would have been harmed by permitting the Santeria to sacrifice pigeons, doves, ducks, guinea pigs, goats, sheep or turtles.

cases.[170] If assent is a basis for deference, then the assent of spouses to plural marriage should limit judicial inquiry in most cases. Indeed, perhaps part of what offends us today about *Reynolds* and *Davis* is their Orwellian vision of the state. Plural marriage offended the Court not because identifiable individuals would have suffered if it were permitted, but because it was a "barbarous practice."[171] Yet this level of governmental intrusion should be intolerable, on religious liberty and other grounds.[172]

D. *YOUNG* AND *THOMAS*—DEEP DEFERENCE DESPITE THIRD-PARTY HARM

The continuum of deference helps explain the varying degrees of deference courts have given religious actors who claim to be engaged in an exercise of religion. The more likely a third party is to suffer a "private" harm, such as competitive disadvantage or the nonpayment of a debt, the more closely the Court will scrutinize whether the activity is actually a religious exercise. Put another way, deference declines as courts perceive third parties to be at risk of harm from treating an activity as a religious exercise. Where third parties would be harmed by defining an activity as a religious exercise, deference is inappropriate. Against this backdrop, the *Young* and *Thomas* cases appear unusual. The courts in both cases defer deeply to claims that the activities in question are religious exercises. Both fail to engage in the independent transactional analysis one would expect from commercial cases such as *Alamo*. This failure is troubling when one considers the consequences to third parties of granting such exemptions.

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170. The Court undoubtedly believed that all of society would suffer if plural marriage were tolerated. In 1890, the Court upheld an act of Congress annulling the charter of the Church of Latter Day Saints and seizing most of its real estate because the church's basic tenet of polygamy was a "barbarous practice" and a "blot on our civilization." Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 49 (1890). Yet "civilization" is a very broad category. Today, it is difficult to identify who, exactly, would suffer any but the most attenuated harm if the Court were to recognize a plural marriage free exercise exemption.

171. *Id.*

172. If courts take *Smith*'s hybrid rights theory seriously, perhaps they should recognize a hybrid religious and personal privacy right, conjoining with the right of free exercise the rights enumerated in such decisions as *Roe v. Wade*, 410 U.S. 959 (1973), *Loving v. Virginia*, 388 U.S. 1 (1967), or *Griswold v. Connecticut*, 381 U.S. 479 (1965). Thus, they could recognize a free exercise exemption for plural marriage.

1. *Young*

In *Young*,[173] the Court of Appeals for the Eighth Circuit found that insolvent religious donors were exempt under the Religious Freedom Restoration Act of 1993 (RFRA)[174] from the constructive fraudulent conveyance rules of the United States Bankruptcy Code.[175] In the process, *Young* permitted an otherwise avoidable transaction to survive over the fairly overt, private harm to unpaid creditors of the donors. While tithing may be a religious exercise under some definitions of religion, the level of deference seen in *Young* is unprecedented where the harm to third parties is so readily identifiable.

Bruce and Nancy Young, married debtors, regularly gave ten percent of their annual income to their church notwithstanding their growing insolvency.[176] During the year preceding the filing of their bankruptcy petition, and while insolvent, they contributed a total of $13,450 to the Crystal Evangelical Free Church.[177] After the Youngs went into bankruptcy, their Chapter 7 trustee sued the Youngs and their church under § 548(a)(2)(A) of the Bankruptcy Code to recover these payments as constructive fraudulent conveyances. This section of the Bankruptcy Code empowers a bankruptcy trustee to avoid and recover transfers by an insolvent debtor to the extent that the debtor received less than reasonably equivalent value in exchange for the debtor's transfer.[178] Both the bankruptcy

173. *See* Christians v. Crystal Evangelical Free Church (*In re* Young), 82 F.3d 1407 (8th Cir. 1996), *reh'g en banc denied*, 89 F.3d 494 (8th Cir. 1996) (holding that the Religious Freedom Restoration Act of 1993 is a defense to a fraudulent conveyance action), *cert. granted sub nom.* Christians v. Crystal Evangelical Church, 521 U.S. 1114 (1997) (vacating the judgment and remanding in light of the holding in *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking the Religious Freedom Restoration Act of 1993 as applied to a state zoning law)), *aff'd* 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 43 (1998).

174. 42 U.S.C. § 2000bb-1 (1994).

175. *See* 11 U.S.C. § 548 (1994).

176. *See In re Young*, 82 F.3d at 1410; *see also* Laurie Goodstein, *Religious Groups Fight U.S. in Bankruptcy Case*, WASH. POST, May 23, 1994, at Al; Pierre Thomas, *Clinton Stops Justice Department from Seeking Forfeiture of Tithes*, WASH. POST, Sept. 16, 1994, at A8.

177. *See In re Young*, 82 F.3d at 1410.

178. *See* 11 U.S.C. § 548. The Religious Liberty and Charitable Contribution Protection Act amended the Bankruptcy Code to clarify that charitable contributions are not fraudulent transfers unless made with fraudulent intent. The bill applied to pending cases and it preempts state court litigation once a bankruptcy petition has been filed. It protects any organization that is tax-exempt under § 170(c)(1) or (c)(2) of the Internal Revenue Code, without dis-

court[179] and the district court[180] held that the Youngs received little or no value in exchange for their donations. Since they were insolvent when they made the donations, the payments were avoidable constructive fraudulent conveyances.

Before the United States Court of Appeals for the Eighth Circuit, the Youngs claimed that tithing was a religious exercise that was protected by RFRA. Section 3 of RFRA codifies the strict scrutiny standards of *Sherbert v. Verner*[181] and *Wisconsin v. Yoder*,[182] providing that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability [unless the government shows that the law] (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[183] After reasoning that it could apply RFRA retroactively,[184] the Eighth Circuit reversed the lower courts, concluding that recovery of the Youngs' tithes "substantially burden[ed]" their

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tinguishing religious and secular charities.

179. *See* Christians v. Crystal Evangelical Free Church (*In re* Young), 148 B.R. 886, 896 (Bankr. D. Minn. 1992). In the bankruptcy court, the parties stipulated that the only significant issue to resolve was whether the Youngs received reasonably equivalent value in exchange for their donations. The bankruptcy court, acting prior to the enactment of RFRA, granted the trustee's motion and denied the Youngs' motion, holding that the debtors had received no economic value for their tithe. Any benefit the Youngs received was religious, not economic, in nature. *See id.* at 893-94 & n.10.

180. *See* Christians v. Crystal Evangelical Free Church (*In re* Young), 152 B.R. 939, 948-49 (Bankr. D. Minn. 1993). On appeal from the bankruptcy court, the district court upheld the bankruptcy court's finding that the debtors received inadequate consideration. *See id.* at 949. Goodwill and church services, the district court concluded, were not the sort of fairly concrete benefits that constitute reasonably equivalent value for fraudulent conveyance purposes. *See id.* at 950.

181. 374 U.S. 398 (1963).

182. 406 U.S. 205 (1972).

183. 42 U.S.C. § 2000bb-1 (1994). RFRA's stated purposes are: "(1) to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government." *Id.* § 2000bb(b). As discussed in Part II, I call this set of tests "strong" protection for religious liberty under the Free Exercise Clause, as distinguished from the "weak" protection afforded by *Smith* and *Boerne*.

184. Christians v. Crystal Evangelical Free Church (*In re* Young), 82 F.3d 1407, 1416-17 (8th Cir. 1996), *reh'g en banc denied*, 89 F.3d 494 (8th Cir. 1996), *cert. granted, vacated, and remanded*, 521 U.S. 1114 (1997), *aff'd* 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 43 (1998).

free exercise of religion, was not in furtherance of a compelling governmental interest and therefore violated RFRA.[185]

The *Young* court began its analysis by acknowledging that, to be a "substantial burden," "'the governmental action must burden a religious belief rather than a philosophy or a way of life. [T]he burdened belief must be sincerely held by the [person].'"[186] The court purported to apply the three-prong test developed in *Werner v. McCotter*, which construed a "substantial burden" under RFRA as being a law, rule or regulation that (i) "significantly inhibit[ed] or constrain[ed] conduct or expression that manifests some central tenet of a [person's] individual beliefs," (ii) "meaningfully curtail[ed]" the ability to "express adherence" to a person's faith, or (iii) denied a person "reasonable opportunities to engage in those activities that are fundamental" to the person's religion.[187] Yet with little analysis, *Young* "assume[d] that the recovery of these contributions would substantially burden the debtors' free exercise of religion."[188] The

185. *Id.* at 1417.

186. *Id.* (quoting Werner v. McCotter, 49 F.3d 1476, 1480 n.1 (10th Cir. 1995) (citation omitted)). This statement poses several problems. First, it is not clear what distinction a court could draw between a "religious belief," on the one hand, and a "philosophy or way of life," on the other. Certainly it is difficult to understand how, as the *Young* court concluded, spending money (tithing) is the former rather than the latter. It is also difficult to understand how a court using the *Werner* formulation could ever determine the sincerity of belief if, as the *Hernandez* court noted, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." Hernandez v. Commissioner, 490 U.S. 680, 699 (1988); *see also* Employment Div. v. Smith, 494 U.S. 872, 887 (1990) ("It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field."). The *Young* court addressed none of these problems.

187. *In re Young*, 82 F.3d at 1418 (citing Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995)).

188. *Id.* There are other tests that could be applied to determine whether a law imposes a "substantial burden." For instance, a court could consider whether, like the Ninth Circuit, a religious practice is "mandated" by the adherent's religion. Under this test:

> "the religious adherent . . . has the obligation to prove that a governmental [action] burdens the adherent's practice of his or her religion . . . by preventing him or her from engaging in conduct . . . which the faith mandates. This interference must be more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine."

Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995) (quoting Graham v. C.I.R., 822 F.2d 844, 850-51 (9th Cir. 1987), *aff'd sub nom.* Hernandez v. Commissioner, 490 U.S. 680 (1988)). Although tithing (or other forms of religious

court concluded summarily that "[p]ermitting the government to recover these contributions would effectively prevent the debtors from tithing, at least for the year immediately preceding the filing of the bankruptcy petitions."[189]

The court dismissed as irrelevant the bankruptcy trustee's arguments that avoiding and recovering the tithes would not burden the religious exercise of the Youngs or their church. For example, the trustee argued, the Youngs could continue to tithe in the future, and there were other ways in which the Youngs could express their religious beliefs besides paying cash.[190] Moreover, the retroactive nature of the fraudulent conveyance laws (only payments already made can be avoided) meant that, logically, the Youngs' right *to* tithe was *not* impaired.[191] The court disagreed. "It is sufficient that the governmental action in question meaningfully curtails, albeit retroactively, a religious practice of more than minimal significance in a way that is not merely incidental."[192] *Young* therefore identifies a burden without explaining why the burdened activity was a religious exercise. What, exactly, made tithing a "religious practice?"

The problem with *Young* is one of method, not conclusion. If the continuum of deference accurately correlates judicial scrutiny with the likelihood of third-party harm, then *Young* defies this continuum. Where third parties are likely to be harmed, courts (or at least the Supreme Court) will not defer deeply, as did the *Young* court. Instead, they will—and should—independently analyze the transaction that actually occurred. Since the nonpayment of creditors is a readily cognizable third-party harm, it is difficult to understand why *Young* failed to scrutinize tithing independently.

Under the transactional analysis in cases like *Alamo*, the Court could have concluded that, while third parties would be

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spending) may be strongly encouraged, it is unclear whether it is *mandated*, although the meaning of the term "mandate" is admittedly unclear. It is also not clear that tithing commitments must be fulfilled in cash.

189. *In re Young*, 82 F.3d at 1418.

190. *See id.*

191. But compare the reasoning of the Bankruptcy Court in *In re Newman*, which held that tithing is complete in the giving (not necessarily the keeping) of the tithe. *See* Morris v. Midway Southern Baptist Church (*In re* Newman), 183 B.R. 239, 251 (Bankr. D. Kan. 1995).

192. *In re Young*, 82 F.3d at 1418-19 (citing *In re* Tessier, 190 B.R. 396, 403-04 (Bankr. D. Mont. 1995)). It is not entirely clear why the *Young* court did not find avoidance of the tithe "merely incidental." *Id.*

harmed by treating tithing as religious exercise, this harm was minimal in contrast to the religious significance of the activity.[193] Alternatively, the *Young* court could also have looked to *Murdock* for guidance, to conclude that tithing was akin to "spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations," and was therefore "an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types."[194] The *Young* court could also have engaged in Wittgenstein's analogical method commended by professors Freeman[195] and Greenawalt.[196] If the court "looked and saw" the transactions in question, it could have concluded that the regular donation of 10% of one's income to a church was but one of a series of "similarities" and "relationships" between activities we would generally consider to be religious exercise.[197]

The *Young* court did none of these things. It simply deferred deeply to the claim that tithing was a religious exercise. The methodological problem is that of all incomplete judicial

193. *See* Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 299 (citing Donovan v. Tony & Susan Alamo Found., 567 F. Supp. 566, 573 (W.D. Ark. 1982); Donovan v. Tony & Susan Alamo Found., 722 F.2d 397, 400 (8th Cir. 1983)).

194. Murdock v. Pennsylvania, 319 U.S. 105, 110 (1943).

195. *See* Freeman, *supra* note 27, at 1534-48.

196. *See* Greenawalt, *supra* note 27, at 762-76.

197. WITTGENSTEIN, *supra* note 51, § 66, 31-32. If one believes the Old and New Testaments are a guide, it is actually not so clear as one may think. *See* Keating, *supra* note 1, at 1055. Both texts contain many references to an obligation to tithe, or at least to an obligation to give back to God out of the material things we are given. Some Old Testament examples include *Exodus* 23:19 ("Bring the best of the first fruits of your soil to the house of the Lord your God."), and *Malachi* 3:8 ("'Will a man rob God? Yet you rob me. But you ask, 'How do we rob you?' In tithes and offerings."). For more Old Testament references to tithing, see *Genesis* 28:22 ("[A]nd this stone that I have set up as a pillar will be God's house, and of all that you give me I will give you a tenth.") and *Deuteronomy* 26:1-14 (explaining procedures for offering first fruits). Yet the Bible would also appear to command the faithful to pay their debts. In the Old Testament, *Psalms* 37:21 says, "[t]he wicked borrow and do not repay, but the righteous give generously. . . ." Another Old Testament passage, *Proverbs* 3:27-28, says: "Do not withhold good from those who deserve it, when it is in your power to act. Do not say to your neighbor, 'Come back later; I'll give it tomorrow,' when you have it with you." Jesus rebuked the Pharisees for focusing on their tithe at the expense of justice to their fellow men in *Luke* 11:42: "'Woe to you Pharisees, because you give God a tenth . . . but you neglect justice and the love of God. You should have practiced the latter without leaving the former undone.'" Since the Bible contains no priority-of-payment rules, one may ask how, as a matter of ecclesiastical law, insolvent debtors should spend their limited funds.

opinions: What is the precedential value?[198] What kind of roadmap does the *Young* court draw for future religious claimants, or for those who believe they have been aggrieved by religious actors or their activities? The answer appears to be none. At all but a superficial level, the *Young* court failed to explain why tithing is a religious exercise and spending money more generally is not. While most of us would agree intuitively that the Youngs' tithes were a religious exercise (whether or not entitled to protection from avoidance being a separate question), the *Young* court provides no analytic basis for deciding future cases.

Deference of this sort may be acceptable in resolving internal church matters or disputes between religious claimants and the state in the exercise of its police power. However, where third parties are harmed, such deference is troubling for at least three reasons.[199] First, and most obviously, the decision subjects third parties to the definitional whims of religious actors. What if, instead of tithing, the Youngs' religion compelled them to worship on someone else's private property?[200] Nothing in the *Young* decision would help a court considering whether such a violation of private rights was also a religious exercise. Second, deference dilutes the seriousness with which courts should approach all religious liberty disputes. Deference is judicial indifference to both the religious actors and third parties. Religious actors deserve to know why the law does or does not protect their free exercise rights. Third, deference undermines the credibility of the judiciary. We reasonably expect more of judges when disputes involve concrete harms to identifiable individuals. Deference disappoints those expectations.

198. *See generally* Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

199. The nature of the harm in question is discussed in detail *infra* Part II.D.1.

200. Consider, in this connection, the *Lyng* case, where Justice O'Connor refused to stop the federal government from building a road that would "'virtually destroy the ... Indians' ability to practice their religion.'" Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451-52 (1988). If the property in question, the Chimney Rock area of the Six Rivers National Forest, was private property instead, would the result have been different? Consider, in this regard, Justice O'Connor's concern that, if the Court recognized a free exercise exemption in *Lyng*, then "[similar claims] could easily require *de facto* beneficial ownership of some rather spacious tracts of public property." *Id.* at 453. For an excellent critique of *Lyng*, see Lupu, *supra* note 64, at 945-46.

2. *Thomas*

If the deference of *Young* were limited to that case, it may be distinguishable as simply a hard, and perhaps unusual, case. But *Young's* general approach to the definitional problem—deep deference notwithstanding third-party harm—appeared again in the (now withdrawn) opinion in *Thomas.* There, the United States Court of Appeals for the Ninth Circuit effectively held that leasing real property is an exercise of religion that permits landlords to discriminate against unmarried couples, in violation of fair housing laws.[201]

The landlords in the *Thomas* case, Kevin Thomas and Joyce Baker, leased residential real estate in Anchorage, Alaska. Both were "professed Christians who believe that cohabitation between unmarried individuals constitutes the sin of fornication and that facilitating cohabitation in any way is tantamount to facilitating sin."[202] Thomas and Baker[203] "committed themselves to practicing their faith in all aspects of their lives, including their commercial activities as landlords."[204] Although the landlords "willingly rent[ed] to persons of any race . . . gender, single persons, and separated or widowed persons, they refuse[d] to rent to unmarried persons who plan[ned] to live together."[205]

The landlords' refusal to rent to unmarried couples violated the fair housing statutes of both Alaska and the City of Anchorage.[206] Alaska's fair housing law, for example, made it unlawful "to refuse to sell, lease, or rent . . . real property to a person because of marital . . . status."[207] The landlords sued the Executive Director of the Alaska State Commission on Hu-

201. *See generally* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 714-17 (9th Cir. 1999), *opinion withdrawn on grant of reh'g by* Thomas v. Anchorage Equal Rights Comm'n, 192 F.3d 1208 (9th Cir. 1999).

202. *Id.* at 696. There was no apparent dispute about the sincerity of their beliefs. *See id.* The court cited certain passages of the Bible as support for its view of their credibility. *See id.* at 696 n.2 (citing, e.g., *Genesis* 2:24). As discussed below, this may have established the landlords' sincere "belief"—but does it also establish that leasing real property is an exercise of that "belief?"

203. Thomas and Baker were not married to each other. Baker's husband, Gary Baker, elected not to proceed with the litigation before the Ninth Circuit Court of Appeals. *See id.* at 696 n.1.

204. *Id.*

205. *Id.* at 696.

206. *See id.* at 697 (citing ALASKA STAT. § 18.80.240(1) (Michie 1998) and ANCHORAGE ALASKA MUN. CODE § 5.20.020(A)).

207. *Id.* (citing ALASKA STAT. § 18.80.240(1)).

man Rights, the Anchorage Equal Rights Commission and the Municipality of Anchorage seeking prospective declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. § 2201.[208] They claimed that enforcement of the various antidiscrimination laws would violate their free exercise rights and their rights under RFRA.[209] The United States District Court for the District of Alaska, on cross-motions for summary judgment, held, among other things, that the landlords' claims were ripe for review, and that Alaska's antidiscrimination laws violated the landlords' free exercise rights.[210] The Equal Rights Commission appealed.

The Court of Appeals for the Ninth Circuit began its substantive analysis with a review of *Employment Division v. Smith*,[211] which announced that the right to free exercise of religion did not relieve an individual of the duty to comply with an otherwise valid and "neutral" law of general application.[212]

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208. *See id.* at 697.

209. *See id.* at 697 n.4. The opinion noted that the district court for the District of Alaska found for the landlords under both the Free Exercise Clause and RFRA. *See id.* The intercession of *Boerne*, however, *see infra* notes 307-17 and accompanying text, eliminated the use of RFRA against state laws such as Alaska's fair housing laws.

210. *See Thomas*, 165 F.3d at 717. The opinion considered the claims of the landlords to be "ripe," since the landlords had "'concrete plans'" to violate the antidiscrimination laws and there was therefore a "'reasonable threat'" of prosecution. *Id.* at 698 (citing San Diego Gun Rights Comm'n v. Reno, 98 F.3d 1121, 1126-27 (9th Cir. 1996)). It apparently did not matter to the *Thomas* court that the Alaska housing and equal opportunity authorities had never even "heard of"—much less prosecuted—the landlords. *See id.* at 718 (Hawkins, J., dissenting).

211. *See id.* at 700. (citing Employment Div. v. Smith, 494 U.S. 872 (1990)).

212. *See Smith*, 494 U.S. at 878-82. "Neutrality" is a complex and loaded term. For most professional readers, an extended discussion of the contours of "neutrality" would be redundant or boring; for non-professionals, it would likely be incoherent. Professor Laycock has noted that "[t]hose who think neutrality is meaningless have a point. We can agree on the principle of neutrality without having agreed on anything at all." Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 994 (1990). He notes, by way of example, that in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 13 (1988), Justice Brennan and Justice Scalia "fundamentally disagreed on almost every issue in the case, but they both claimed to be neutral. Both of them used the word 'neutrality,' but neither of them defined it." Laycock, *supra*, at 994 (footnote omitted). Yet Professor Laycock is also correct that neutrality has "aspirational" value, that we generally want to believe that a state separated from church can still nourish religion without preference or entanglement. This is, of course, a difficult proposition, well beyond the scope of this Article. *See generally* Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991).

Thus, the *Thomas* court noted that religious claimants were not ordinarily entitled to free exercise exemptions because "most burdens on religious liberty are not direct and intentional, but rather the largely unintended incident of neutral, generally applicable regulations."[213] But, the *Thomas* court reasoned, *Smith* also suggested certain exceptions to its "generally applicable" rule. One, the "hybrid rights" exception, would enable the court to find an exemption for the landlords if they asserted their free exercise claim "in conjunction" with another constitutional right.[214]

How did leasing real estate satisfy the first half of the hybrid rights equation? It is not clear. The *Thomas* court, like the *Young* court, largely deferred to the landlords' assertion that leasing real estate was entitled to First Amendment protection. Their "beliefs regarding fornication," the court reasoned, "are firmly rooted in both Biblical text and in the commentaries of respected Christian theologians."[215] These "beliefs" forced the landlords to make a "Hobson's Choice of sorts between (1) violating their religious beliefs by renting to unmarrieds (2) suffering punishment for refusing to rent to unmarried couples, and (3) forsaking their livelihoods as apartment owners altogether."[216] This choice, the court ultimately concluded, was much like the untenable choice that was struck in *Sherbert* between working on the Sabbath or receiving unemployment benefits.[217]

Before reaching this conclusion, however, the court of appeals had to pass two hurdles that face a religious actor seeking an exemption for seemingly commercial conduct proscribed by a law of general application. First, the court had to bypass *United States v. Lee*, which observed that if one "enter[s] into commercial activity as a matter of choice," one's religious be-

213. *Thomas*, 165 F.3d at 700 (footnote omitted).

214. *See id.* at 702.

215. *Id.* at 696 (footnote omitted).

216. *Id.* at 712.

217. *See id.* at 713. In fact, it appears that the choice was more like that held to be constitutionally permissible in *Braunfeld v. Brown*, where Saturday Sabbatarians were denied the right to open shop on Sunday. 366 U.S. 599, 601, 609 (1961); *see also supra* notes 157-59 and accompanying text. Like the Jews in *Braunfeld*, the landlords were not, in fact, "compelled" to do anything. In *Sherbert*, by contrast, the claimant was affirmatively required to work on Saturday in order to be eligible for unemployment benefits. *See* Sherbert v. Verner, 374 U.S. 398, 402, 406-09 (1963); *see also infra* text accompanying notes 250-64.

liefs "are not to be superimposed on the statutory schemes which are binding on others in that activity."[218] Second, the court had to evade the force of *Alamo*, which announced that religion does not include "commercial enterprises" that (i) "serve the general public," and (ii) compete with "ordinary commercial enterprises."[219]

According to *Thomas*, *Lee* would support (or at least not undermine) the conclusion that leasing real property was a religious exercise. The *Thomas* court reasoned that *Lee* did consider the refusal to participate in the social security system an exercise of religion because *Lee* "[s]eemingly assum[ed] that the burden" on the Amish of complying with the social security system "was substantial."[220] This assumption amounted to a conclusion that the activity (or untenable choice) was a religious exercise.

Here, the *Thomas* court missed a crucial point. On a careful reading, it appears that *Lee* simply deferred to the religious claimants' characterization of their activity as religious exercise.[221] *Lee* did not independently analyze the underlying transactions, as the Court has otherwise done when confronting the overlap of religious exercise and commerce. This may be explained as a function of the absence of third parties. One could argue that, like *Lee*, there were no private third parties in *Thomas*. Both cases involved only the government defending a statute that may or may not be sufficiently important to warrant a religious exemption. Yet one could also argue that *Thomas*, unlike *Lee*, does involve third parties. Alaska's fair housing statutes presumably exist to eliminate discrimination in the housing market. By definition, discrimination always harms private third parties.[222] The social security system,

218. 455 U.S. 252, 261 (1982).

219. Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 299 (1985) (citing Donovan v. Tony & Susan Alamo Found., 567 F. Supp. 566, 573, (W.D. Ark. 1982); Donovan v. Tony & Susan Alamo Found., 722 F.2d 397, 400 (8th Cir. 1983)).

220. *Thomas*, 165 F.3d at 692, 712 (citing United States v. Lee, 455 U.S. 252, 257 (1982)).

221. *See Lee*, 455 U.S. at 257. The *Lee* court reasoned that "[i]t is not within 'the judicial function and judicial competence' . . . to determine whether [the Amish] or the Government has the proper interpretation of the Amish faith; '[c]ourts are not arbiters of scriptural interpretation.'" *Id.* (quoting Thomas v. Review Bd. of Indep. Employment Sec. Div., 450 U.S. 707, 716 (1981)).

222. *See* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1520 (1999) (noting in a discussion about discrimina-

which was at issue in *Lee*, involves all (or most) of us. It is difficult to characterize a system of that magnitude as being for the protection of an identifiable third party.

Even if *Thomas*' reliance on *Lee* is defensible, its use of *Alamo* is not. The *Thomas* court simply assumed that *Alamo* did not "support a per se (or even presumptive) rule that burdens levied in commercial contexts are not constitutionally substantial."[223] That, too, may be true but also misses the point. If there is a correlation between the nature of an activity and the presence of third parties, as suggested by *Alamo* and others, then the *Thomas* court had a duty to analyze the activities in question independently. It would seem a matter of simple intuition that leasing real property is more like running service stations (held not to be a religious exercise in *Alamo*) than the Amish prohibition on participating in the social security system (which was impliedly considered to be a religious exercise in *Lee*).

Thomas deferred more deeply to a claim of religious exercise than had ever been acceptable when such deference threatened to harm third parties. In doing so, the *Thomas* court eschewed the hard work of distinguishing religion from commerce and simply accepted the religious claimants' own characterization of their beliefs and the harms that would befall them should they be denied an exemption. While this level of deference may be appropriate when third parties are not involved, the Supreme Court has not—and should not—permit such deference when third parties are directly or indirectly threatened by the putative exercise of religion.

Some may defend *Thomas* on the grounds that it does not treat acting as a landlord as an exercise of religion. Rather, like *Sherbert*, the *Thomas* court simply refused to subject the landlords to an "untenable choice." There are several ready responses. First, the Constitution does not prohibit the imposition of "untenable choices"—it forbids the government from

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tion laws that "[t]he reason for most restrictions on conduct is precisely that people think the conduct does harm others"). Professor Volokh acknowledges that the issue is less whether there *is* harm than "*who ultimately defines* what constitutes infringement of the private rights of others . . . ." *Id.* at 1520-21 (quotation marks omitted). As discussed below, the problem with *Thomas* is that, by treating the activity of landlord as a form of religious exercise cloaked in strict scrutiny, the court of appeals failed to take seriously its obligation to balance either side of the equation.

223. *Thomas*, 165 F.3d at 712 (citing Attorney General v. Desilets, 636 N.E.2d 233, 238 (Mass. 1994) (applying Massachusetts' state constitution)).

prohibiting the "free exercise" of "religion." Second, untenable choice is rarely a basis for granting a free exercise exemption in the Supreme Court. In *Braunfeld*, *Alamo, Lee* and *Hernandez*, for example, the Court held that the untenable choices between religious exercise and complying with Sunday closing laws, labor laws, social security regulations and the United States tax code, respectively, were not grounds for exemptions from those laws.

Third, even if an "untenable choice" is a permissible basis for granting a religious liberty exemption when the dispute is limited to religious actors and the state, a different analysis should apply when third parties would suffer. The source of the untenable choice test, *Sherbert*, is easily distinguishable from *Thomas* on these grounds. It does not appear that third parties were directly harmed by recognizing an exemption in *Sherbert*. The party in interest there was the government, as provider of unemployment benefits.[224] In *Thomas*, by contrast, the exemption from Alaska's fair housing statutes had a direct and harmful effect on private third parties by limiting their market choice on an impermissible basis.

Fourth, *Thomas* offers no limiting principle. Would the *Thomas* court have come to a different result if, instead of unmarried couples, the landlords sought to discriminate against African-Americans or Jews? What if Irish Catholic landlords sought to discriminate against Protestant tenants? The Ninth Circuit offered no principled basis for distinguishing these untenable choices from that sanctioned in the *Thomas* decision. Rather, like *Young*, *Thomas* deferred deeply to the landlords' claim that leasing real property was a religious exercise entitled to First Amendment protection.

Perhaps these problems led the Ninth Circuit to withdraw the *Thomas* opinion.[225] As of this writing, the case has been scheduled for rehearing en banc after publication of this Article. If the rehearing panel takes seriously the judicial duty to

224. It is, of course, conceivable that large-scale employment exemptions could harm third parties in a variety of ways, including loss of productivity to employers, increased unemployment insurance premiums, etc. In *Sherbert*, however, such harm appeared not to be a realistic problem. Indeed, the Court noted that the state did not even raise the issue. *See* Sherbert v. Verner, 374 U.S. 398, 407 (1963).

225. *See* Thomas v. Anchorage Equal Rights Comm'n, 192 F.3d 1208 (9th Cir. 1999).

consider third-party harms, perhaps it will consider whether, and if so how, leasing real property was an exercise of religion.

II. BALANCING HARMS AND THE ANXIETY OF ANARCHY

Wholly apart from the question of how, if at all, courts may define "religion," there remains the question of how courts will protect that which satisfies the definition. In broadest terms, courts have articulated two different forms of protection for religious liberty, the "strong"[226] and the "weak." The strong form—or rhetoric suggestive of the strong form—enjoyed Supreme Court favor from 1940 to 1990. Since the 1990 *Smith* decision, protection for religious liberty has eroded to a weaker form, at least when "neutral" laws of general application prohibit an exercise of religion. Congress, state legislatures and lower federal courts have responded with various strategies for providing the greatest possible protection for religious liberty—even when that protection may incidentally harm third parties.

This Part discusses the role that judicial balancing plays in protecting religious liberty. Judicial balancing was a central feature of strong protection. While *Smith* is generally viewed as having weakened protection for religious actors, that case also eliminated judicial balancing. If the *Young* and *Thomas* cases are any indication, then by stripping courts of the power to balance harms in religious liberty disputes, *Smith* unwittingly created the very anarchy it sought to contain.

A. STRONG PROTECTION—BALANCING HARMS PLUS STRICT JUDICIAL SCRUTINY

Strong protection for religious liberty is generally understood as strict judicial scrutiny of laws that substantially burden religious exercise. The legal community tends to assume that this level of protection for religious liberty has its roots in the 1963 *Sherbert v. Verner* decision.[227] Generally speaking, this makes sense, because *Sherbert* merged the two components of prior case law that created this level of protection: (i) a judi-

226. I appreciate the irony of this characterization. Many have argued persuasively that the "strong" standard articulated in *Sherbert* was "feeble in fact." Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 446-47 (1994).

227. 374 U.S. 398 (1963). Indeed, *Sherbert*, but not its predecessors, forms the basis of RFRA.

cial balancing of the harm caused by enforcing a law against the harm caused by exempting a religious actor from it, *plus* (ii) a presumption that "substantial burdens" on religion require very good ("compelling") state interests as justification.[228] In simple terms, *Sherbert*'s test implied *both* a "scale" and a "thumb" on the scale, weighing in favor of religious actors. Yet if strong protection for religious liberty requires courts to balance harms, then the roots of such protection pre-date *Sherbert* by more than twenty years, and can be found in the Court's 1940 decision, *Cantwell v. Connecticut*.[229]

1. The Roots of Balancing—The Religious Solicitation Cases

Cantwell and his two sons were Jehovah's Witnesses who had been arrested for going door-to-door with books, pamphlets and phonograph records about the Jehovah's Witnesses.[230] Although they may have been a nuisance to New Haven's Catholics, the Cantwells caused little legally cognizable harm. Nevertheless, their activity violated Connecticut's antisolicitation statute, which provided that "'[n]o person shall solicit money . . . for any alleged religious, charitable or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting . . . unless such cause shall have been approved by the secretary of the public welfare council.'"[231] Violators could expect to pay a fine of $100 or spend thirty days in jail.

The Court began its analysis by exploring the long-recognized (but textually troubling)[232] distinction between (protected) "belief" and (unprotected) "conduct" that emanated from *Reynolds v. United States*[233] and *Davis v. Beason*.[234] These cases held that Mormons could be criminally prosecuted (or discriminated against) for polygamous marriage because such "conduct" was beyond the scope of the First Amendment.[235] In an important act of reversal-by-distinction, a unanimous Court

228. *See generally Sherbert*, 374 U.S. at 403-09.
229. 310 U.S. 296 (1940).
230. *See id.* at 300.
231. *Id.* at 302 (quoting CONN. GEN. STAT. § 6294 (Supp. 1937)).
232. *See* McConnell, *supra* note 5, at 1114-16.
233. 98 U.S. 145, 166 (1878).
234. 133 U.S. 333, 338 (1890).
235. *See Davis*, 133 U.S. at 338-40; *Reynolds*, 98 U.S. at 166 ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").

held that, while government could regulate religious conduct ("exercise"), it could not do so in *Cantwell*. The First Amendment, Justice Roberts wrote, "embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. *Conduct remains subject to regulation for the protection of society.*"[236]

By exempting the Cantwells from Connecticut's anti-solicitation statute, the *Cantwell* Court held that the state cannot always, absolutely limit religious conduct. Instead, courts would have to balance the need for a regulation against the religious interests of the claimant.[237] "In every case," the Court held, "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."[238] Yet *Cantwell* also recognized that the "state" was not an end in itself, but merely a means to protect individuals from harm. "The general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection. . . ."[239]

Later solicitation cases use *Cantwell*'s analysis, too. Similar balancing appears in *Ballard*,[240] *Murdock*,[241] and *Follett*,[242] all of which concluded that religious exercise in violation of a generally applicable law regulating solicitation outweighed the harm of enforcing such laws. *Ballard*, for example, concluded that the government could not prosecute Guy Ballard for mail fraud for claiming that he had been selected as a "divine messenger."[243] Even if these representations were made "with the intention . . . to cheat, wrong, and defraud persons, and to obtain . . . money, property, and other things of value,"[244] the harm to third parties was tolerable if the representations were "religious" in nature.[245] Similarly, in *Murdock* and *Follett*, the

236. *Cantwell*, 310 U.S. at 303-04 (citing Reynolds v. United States, 98 U.S. 145 (1878); Davis v. Beason, 133 U.S. 333 (1890)) (emphasis added).

237. *Cf.* Gressman & Carmella, *supra* note 25, at 78 (discussing "signals of movement toward" balancing "as early as 1940").

238. *Cantwell*, 310 U.S. at 304.

239. *Id.* at 305.

240. *See* United States v. Ballard, 322 U.S. 78, 86-88 (1944).

241. *See* Murdock v. Pennsylvania, 319 U.S. 105, 110-17 (1943).

242. *See* Follett v. McCormick, 321 U.S. 573, 576-78 (1944).

243. *Ballard*, 322 U.S. at 79, 86.

244. *Id.* at 80.

245. *See id.* at 86 ("[W]e do not agree that the truth or verity of [defendants'] religious doctrines or beliefs should have been submitted to the

Court appears to have concluded that selling religious pamphlets door-to-door, while perhaps obnoxious to some, was not so harmful as to require the Jehovah's Witnesses in those cases to comply with state licensing procedures applicable to other door-to-door merchants.[246]

The religious solicitation cases suggest that the judicial duty to balance harms results in part from concern about third-party harm caused by religious exercise.[247] Balancing harms is an appropriate judicial method for determining the limits of religious conduct, especially when such conduct may harm third parties. Rather than subordinating all religious conduct to laws of general application (or vice versa), these cases suggest that enforcement of, or exemption from, a law should be determined by reference to the effect such decisions have on third parties.

2. Strict Scrutiny—A Thumb on the Scale

While *Cantwell* and *Ballard* held that courts could—and perhaps should—balance the harm of enforcement against the harm of exemption, they failed to say whether, or how, the scales should be set in the first place.[248] Although, at the time of *Cantwell*, the Court had already announced the use of

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jury.... 'The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.'" (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1871))).

246. *See Follett*, 321 U.S. at 577; *Murdock*, 319 U.S. at 108-09. Another solicitation case, *Larson v. Valente*, 456 U.S. 228 (1982), raised similar issues. There, the State of Minnesota required religious organizations that received more than half of their total contributions from non-members to register with the Minnesota Department of Commerce before soliciting contributions in the state of Minnesota. *See Larson*, 456 U.S. at 231 (citing MINN. STAT. § 309.52 (1969 & Supp. 1982)). The Court struck these provisions under the Establishment Clause as effectively singling out the Unification Church, giving denominational preference to other, better established religions. *See id.* at 246. The Court, per Justice Brennan, acknowledged that "the State of Minnesota has a significant interest in protecting its citizens from abusive practices in the solicitation of funds for charity...." *Id.* at 248. Minnesota's fifty percent rule, however, was not sufficiently "closely fitted" to this legislative goal to justify the preference in fundraising it effectively gave to some religious groups. *Id.* at 255. Protecting third parties, in other words, was a basis for balancing harms, even if the Court would not necessarily find such harm a basis for upholding a law.

247. Other concerns evident in these cases include the rights to speech, expression and association contained in the First Amendment.

248. *See generally* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 943-44 (1987).

"heightened" scrutiny in certain cases,[249] it appears that no thumb rested on the scales. There was, in other words, balancing, but no apparent presumption that the religious activity at issue should enjoy the strong protection of strict scrutiny.

Strict scrutiny—a thumb on the scale—was first applied to free exercise cases in *Sherbert v. Verner*,[250] where the Court held that the state was required to show a compelling interest in denying unemployment benefits to a Seventh Day Adventist church member who was ineligible for work due to religious observance requirements.[251] The First Amendment claimant in *Sherbert* argued that denying her unemployment benefits violated her free exercise rights. The Court agreed. The *Sherbert* Court reasoned that denying unemployment benefits impermissibly burdened the claimant's free exercise rights by causing her to forego a benefit if she chose to follow the dictates of her religion.[252] The fact that the unemployment benefits involved were a "privilege" instead of a "right" was insufficient to overcome the constitutional problems arising from denial of these benefits, particularly when the ultimate reason was the claimant's religious beliefs.[253] To the contrary, "[g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."[254]

The *Sherbert* Court did not intend to create unlimited free exercise rights. Religious conduct could be limited under *Sherbert* where it "posed some substantial threat to public safety, peace or order."[255] Thus, the Court cited and distinguished

249. The levels-of-scrutiny approach was first suggested in *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938), in which the Court recognized that certain rights would receive increased judicial protection in the form of a "more searching judicial inquiry."

250. 374 U.S. 398 (1963).

251. *See id.* at 406-09.

252. *See id.* at 404.

253. *See id.* at 404-06.

254. *Id.* at 404. This analogy seems strained in light of the fact that unemployment benefits were in question. A fine implies that the state took something from Sherbert for exercising her right to worship. But the state provided benefits to which she was entitled notwithstanding the observance requirements of her religion.

255. *Id.* at 403 (citing Reynolds v. United States, 98 U.S. 145 (1878); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Prince v. Massachusetts, 321 U.S. 158 (1944); Cleveland v. United States, 329 U.S. 14 (1946)). It is not clear how the polygamy forbidden in *Reynolds*—which presumably involved consensual marriages among adults—threatened *"public* safety, peace or order." *Id.* (em-

Braunfeld, which had refused to exempt Saturday Sabbatarians from Sunday closing laws[256] out of concern for harm to third parties. *Braunfeld* reasoned that "[r]equiring exemptions [from Sunday closing laws] for Sabbatarians, while theoretically possible, appeared . . . to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable."[257] The harm to third parties of exemption in *Sherbert*, by contrast, was negligible.[258] While granting exemptions from the unemployment rules could lead to fraudulent claims or interfere with employer scheduling, the Court reasoned that this harm was not sufficiently plausible "to warrant [this] substantial infringement of religious liberties."[259]

The effect of *Sherbert* was to treat religious practices that were especially important to the individual as a substantive right beyond regulation.[260] As with the jurisprudence of many other constitutional provisions, such as the Free Speech Clause, the *Sherbert*-era constitutional exemption framework was a complex body of law, with not one but several tests in practice, none especially rigorous. Thus, when the government acted as prison administrator or as employer of military personnel, little weight was given to the claims of the religious actor; judicial scrutiny was closer to a rational basis test than to the "strict" scrutiny announced in *Sherbert*.[261] When the gov-

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phasis added).

256. *See* Braunfeld v. Brown, 366 U.S. 599, 606-07 (1961).

257. *Sherbert*, 374 U.S. at 408-09 (citing Note, *State Sunday Laws and the Religious Guarantees of the Federal Constitution*, 73 HARV. L. REV. 729, 741-45 (1960)).

258. This is not a terribly persuasive argument. Closing on Saturdays would have deprived Jews of a significant amount of business, which they may or may not have made up if permitted to open on Sunday. If one believes, as the *Braunfeld* Court claimed to believe, that Sunday closing laws reflected the otherwise legitimate and "secular" desire to have a "day of rest," then presumably most shoppers would have been resting on Sunday, anyway. Sunday Sabbatarians would therefore have lost little business and suffered little harm. Nevertheless, it was reasonable to believe that *some* business would have been lost, and such loss would have resulted in *some* third-party harm.

259. *Sherbert*, 374 U.S. at 407.

260. *See* Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 885 (1994).

261. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987) (applying the rational basis standard to prison regulations which hindered the petitioners' ability to attend religious services); Goldman v. Weinberger, 475 U.S. 503, 510 (1986) (applying the rational basis standard to military regulations which forbade the petitioner from wearing a yarmulke); *see also* Ira C. Lupu, *Of Time*

ernment was acting as employer, some lower courts likewise adopted fairly (but not entirely) deferential tests.[262] There was no agreed-on test for the government acting as grammar school educator, but courts at least had the option of concluding that the free exercise test—like the free speech test—should be relatively deferential in such cases, too.[263] In short, even the "strong" protection afforded under the Free Exercise Clause was anything more than "feeble."[264]

B. WEAK PROTECTION—*SMITH* AND THE END OF BALANCING

In 1990, troubled by the potentially anarchic effect of strong protection for religious liberty and the erratic use of strict scrutiny under the Free Exercise Clause, the Court abandoned strong protection for religious liberty in the controversial *Smith* decision.[265] In announcing that religious actors were not exempt from neutral laws of general application, no matter the harm they suffered, the Court effectively held that, at least as a constitutional matter, courts had no obligation to balance harms in the free exercise context. Rather than lifting the thumb, *Smith* threw out the scales.

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and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act, 56 MONT. L. REV. 171, 191-98 (1995).

262. *See, e.g.*, Baz v. Walters, 782 F.2d 701, 708 (7th Cir. 1986); Philadelphia Lodge No. 5 v. City of Philadelphia, 599 F. Supp. 254, 258 (E.D. Pa. 1984) (mem.); Doherty v. Wilson, 356 F. Supp. 35, 40 (M.D. Ga. 1973); Barlow v. Blackburn, 798 P.2d 1360, 1366 (Ariz. 1990).

263. *Compare* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1073 (6th Cir. 1987) (Boggs, J., concurring), *with, e.g.*, Spence v. Bailey, 465 F.2d 797, 800 (6th Cir. 1972), *and* Moody v Cronin, 484 F. Supp. 270, 277 (C.D. Ill. 1979).

264. *See* Eisgruber & Sager, *supra* note 226, at 446-47. Professor Steven Smith has argued that during the *Sherbert* era, balancing by the Supreme Court was illusory, since the Court did not view the disputes in, for example, *Yoder* as involving true conflicts of ends, but only of means. *See* Steven D. Smith, *Free Exercise Doctrine and the Discourse of Disrespect*, 65 U. COLO. L. REV. 519, 529-31 (1994). Thus, *Yoder* evaded the obligation to balance harms because the Amish were viewed as proxy for the state in satisfying the legislative goal of educating children. It is interesting to consider whether *Yoder* would have produced the same result if, instead of seeking an exemption from compulsory education, the Amish in that case sought to engage in conduct that could have harmed third parties, for instance, driving slow-moving vehicles without proper warning signs. Under the constitutions of Wisconsin and Minnesota, the Amish have been exempted from such requirements. *See, e.g.*, State v. Hershberger, 462 N.W.2d 393, 399 (Minn. 1990); Miller v. State, 549 N.W.2d 235, 242 (Wis. 1996).

265. *See* Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

The claimants in *Smith* were fired from their jobs at a private drug rehabilitation center because they ingested the hallucinogenic drug peyote while attending a religious ceremony of the Native American Church in violation of Oregon law.[266] When they applied for unemployment compensation benefits, the state denied their request on the grounds that they had lost their jobs because of work-related misconduct.[267] The claimants sued, alleging that the Oregon law denying their claim violated their rights under the Free Exercise Clause. Although the Oregon Supreme Court agreed with the claimants,[268] the United States Supreme Court did not. Instead, it held that the right to free exercise did not relieve an individual of the duty to comply with an otherwise valid and "neutral" law of general application.[269]

> To make an individual's obligation to obey such a [neutral and generally applicable] law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself"... contradicts both constitutional tradition and common sense.[270]

The *Smith* Court justified its conclusion by reference to the inconsistent application of strict scrutiny in free exercise cases. The Court reasoned that there was little, outside the employment context as it applied to the free exercise of religion, that was not considered a compelling state interest.[271] Thus, notwithstanding the complaints of religious adherents to the contrary, the Court had found "compelling" government interests in maintaining the tax system,[272] preserving national security,[273] ensuring public safety,[274] providing public education,[275] and enforcing participation in the social security system.[276]

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266. *See id.* at 874. The drug rehabilitation center where the claimants worked had a no-tolerance rule for its employees. During the state court proceedings, one of their supervisors testified that employees would similarly have been dismissed had they taken wine during Catholic Mass.

267. *See id.*

268. *See* Smith v. Employment Div., 721 P.2d 445, 450-51 (Or. 1986).

269. *See Smith*, 494 U.S. at 879.

270. *Smith*, 494 U.S. at 885 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)).

271. *See id.* at 877-79. The Court did not explain why or whether this distinction mattered. Nor did it explain, given that *Smith* was also an employment case, why the Court should not be bound by its precedent in that area. Presumably, the illegality of ingesting peyote justified the distinction.

272. *See* Hernandez v. Commissioner, 490 U.S. 680, 699 (1988).

273. *See* Gillette v. United States, 401 U.S. 437, 461 (1971).

Smith ended judicial balancing as a means of resolving contests between neutral laws of general application and religious claimants seeking exemptions from those laws.[277] According to *Smith*, the only role for courts is to determine whether a law is neutral and generally applicable. If so, the harm to the religious claimant is irrelevant. Yet, by eliminating balancing, *Smith* unwittingly set the stage for the very anarchy it sought to prevent. If there is no basis to balance harms in contests with neutral and generally applicable laws, then any effective exemption could be absolute.[278] The harms suffered by third parties could be as immaterial as the harms suffered by religious claimants.

Smith has been the subject of massive and largely hostile criticism.[279] While criticizing the decision may no longer be

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274. *See* Prince v. Massachusetts, 321 U.S. 158, 168-69 (1944).

275. *See* Wisconsin v. Yoder, 406 U.S. 205, 213 (1972).

276. *See* United States v. Lee, 455 U.S. 252, 258 (1982).

277. *See* Gressman & Carmella, *supra* note 25, at 73-74 ("A major theme of the *Smith* opinion . . . is that the balancing of competing interests is a function better left to the legislative bodies." (footnote omitted)); *id.* at 86 ("*Smith* rejected the balancing approach for generally applicable, facially neutral laws . . . .").

278. Professor Steven D. Smith has argued that even before *Smith*, the Court never really "balanced" competing interests in the religious liberty context. *See* Smith, *supra* note 264, at 530-31. As discussed below, to the extent this is true, it is an argument for using equity jurisprudence as the basis for balancing harms in this context.

279. *See, e.g.*, John Delaney, *Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of* Oregon v. Smith, 25 IND. L. REV. 71, 75 (1991) (arguing that *Smith* "violates core principles expressed in our theory of just punishment within a framework of constitutional criminal law"); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 114-15 (1991) (contending that *Smith* "'depublished' the Free Exercise Clause"); Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that Was Never Filed*, 8 J.L. & RELIGION 99, 102 (1990) (explaining that *Smith* was "inconsistent with the original intent, inconsistent with the constitutional text, inconsistent with doctrine under other constitutional clauses, and inconsistent with precedent"); Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259, 260 (describing *Smith* as "substantively wrong and institutionally irresponsible"); McConnell, *supra* note 5, at 1120 (stating that *Smith*'s "use of precedent is troubling, bordering on the shocking"); Roald Mykkeltvedt, Employment Division v. Smith: *Creating Anxiety by Relieving Tension*, 58 TENN. L. REV. 603, 621 (1991); Smith, *supra* note 264, at 575 (criticizing the majoritarian "intolerance" reflected in *Smith*). Not all scholars have disparaged the *Smith* decision. *See, e.g.*, Marci A. Hamilton, *The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 OHIO ST. L.J. 713, 749 (1993) ("*Smith* is not radically different from its forerunners . . . ."); Marci A. Hamilton, *The*

"original or useful,"[280] it remains important to understand the contours of religious liberty jurisprudence after *Smith*. As indicated by *City of Boerne v. Flores*, weak protection for religious liberty remains the posture of the Court. While most attention on *Smith* has focused on the weakness of the protection it affords religious actors, it would appear that *Smith* has also created exceptions through which strong protection survives.

C. *SMITH*'S EXCEPTIONS—HYBRID RIGHTS AND LEGISLATION

Smith suggested that there were three exceptions to the "generally applicable" rule it announced: (i) "hybrid-rights"—a combination of free exercise and other constitutional rights; (ii) legislation expanding protection for religious actors, and (iii) legislation that, by virtue of its underinclusiveness, shows impermissible state hostility to religious actors.[281] Laws protecting third parties, including common law doctrines of tort, contract, property, agency, etc, are typically generally applicable, and therefore not "underinclusive." For that reason, I do not discuss the "underinclusiveness" exception here.

1. Hybrid Rights

To dodge the force of strict scrutiny precedent, such as *Cantwell*, *Sherbert* and *Yoder*, *Smith* "conveniently discovered"[282] what has come to be known as the "hybrid rights" exception. "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, . . . or the right of parents . . . to direct the education of their children . . . ."[283] In other words,

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Constitutional Rhetoric of Religion, 20 U. ARK. LITTLE ROCK L.J. 619, 619 (1998) (arguing that *Smith* represents a "more accurate and vital image of religion" than RFRA); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 (1991).

280. Lupu, *supra* note 279, at 269.

281. *See* Employment Div. v. Smith, 494 U.S. 872, 877, 881-82, 890 (1990). In the *Lukumi* case, the Court used strict scrutiny to strike a facially neutral city ordinance forbidding ritual slaughter because its underinclusive scope had the effect of impermissibly targeting the Santeria religion. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546-47 (1993).

282. James M. Donovan, *Restoring Free Exercise Protections By Limiting Them: Preventing a Repeat of* Smith, 17 N. ILL. U. L. REV. 1, 45 n.18 (1996).

283. *Smith*, 494 U.S. at 881. This assertion, of course, is facially wrong,

the *Smith* Court suggested, strong protection for religious liberty was really protection for religious liberty *plus* some other liberty interest.

Smith alluded to two classes of hybrid, those involving First Amendment rights to speech, association and press, on the one hand, and a parent's Fourteenth Amendment right to control a child's education, on the other.[284] Yet the viability and strength of the exception are unclear. Can other constitutional rights (under the federal or state constitutions) also conjoin with a free exercise claim to create a religious exemption to a generally applicable law? Until the *Thomas* case,[285] it was not clear whether a hybrid rights claim could include a Fifth Amendment property claim.[286]

Nor is the result of a hybrid-rights exception clear. *Smith* failed to say which of the several possible standards of review should be used in a hybrid rights claim. Should the scales be evenly set, as in *Cantwell*, or should there be a presumption in favor of religious claimants, as in *Sherbert*? The cases on which *Smith* relied—*Cantwell, Murdock, Follett, Pierce v. Society of Sisters* and *Yoder*—did not use a single standard of review.[287] As discussed above, *Cantwell*, for example, did not employ the classic form of "strict scrutiny" which gives "strong" protection to religious liberty. *Cantwell* recognized the need to balance harms, but failed to say how the scales should be set in the first place. *Murdock* and *Follett* relied on something resembling strict scrutiny, but in an early form, saying simply that religion, like speech and press, is in a "preferred position."[288] *Pierce*

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unless one believes that *Sherbert*, too, involved a second, protected liberty interest.

284. *See id.* at 882. Professor McConnell has noted that this may have been a rather disingenuous statement by the Court. *See* McConnell, *supra* note 5, at 1120-21. On this logic, *Wisconsin v. Yoder* would have been wrong, since the adherents in that case had no independent constitutional right to withhold their children from school.

285. *See* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 704-05 (9th Cir. 1999), *opinion withdrawn on grant of reh'g by* Thomas v. Anchorage Equal Rights Comm'n, 192 F.3d 1208 (9th Cir. 1999).

286. *See generally* Steckler v. United States, Civ. A. No. 96-1054, 1998 WL 28235, at *1-2 (E.D. La. Jan. 26, 1998) (rejecting a hybrid rights claim including takings under the Fifth Amendment); Peter M. Stein, Smith v. Fair Employment and Housing Commission: *Does the Right to Exclude, Combined with Religious Freedom, Present a "Hybrid Situation" under* Employment Division v. Smith, 4 GEO. MASON L. REV. 141 (1995).

287. *See Smith*, 494 U.S. at 881.

288. Follett v. Town of McCormick, 321 U.S. 573, 577 (1944); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

arose long before *Carolene Products*, the case that is generally viewed as having introduced the levels-of-scrutiny approach.[289] *Yoder* used something resembling the strong formulation enunciated in *Sherbert*.[290]

Finally, it is not clear how hybrid rights should be calculated. Does *Smith* announce a rule of synergy, whereby "two loser constitutional claims = one winner constitutional claim."[291] If so, what is the textual source of this synergy? If *Cantwell*, *Yoder*, and the other "hybrid" precedent cited in *Smith*, do not turn on non-free exercise grounds (e.g., speech), what made the "other" claims (speech and parental control) losers?[292] Or, as Justice Souter pointed out in *Lukumi*,[293] is the "other" claim one in which a litigant would have obtained an exemption from a generally applicable law, anyway? If so, "there would have been no reason for the Court in what *Smith* calls hybrid cases to have mentioned the Free Exercise Clause at all."[294] Nor does *Smith* explain why employment cases—the sole context in which free exercise claims were recognized without hybrid rights[295]—were not controlling.[296] Although the hybrid-rights theory has been scorned as "make-weight,"[297] "untenable,"[298] "unartful,"[299] "'strained'"[300] and "without any

289. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (recognizing that certain rights would receive increased judicial protection in the form of a "more searching judicial inquiry")

290. *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

291. William L. Esser, IV, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smokescreen?*, 74 NOTRE DAME L. REV. 211, 242 (1998); *see also* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 705-07 (9th Cir. 1999), *opinion withdrawn on grant of reh'g by* Thomas v. Anchorage Equal Rights Comm'n, 192 F.3d 1208 (9th Cir. 1999) (recognizing the hybrid rights exception to fair housing laws where religious landlords had "colorable" free exercise and Fifth Amendment claims).

292. *Cf.* EEOC v. Catholic Univ. of America, 83 F.3d 455, 467 (D.C. Cir. 1996) (holding that proper hybrid rights claims must be independently viable); Brown v. Hot, Sexy and Safer Prods., Inc., 68 F.3d 525, 539 (1st Cir. 1995) (same).

293. *See* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 559 (1993) (Souter, J., concurring).

294. *Id.* at 567.

295. *See* Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 835 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 140-41 (1987); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 719 (1981).

296. *See* Employment Div. v. Smith, 494 U.S. 872, 881-82 (1990).

297. Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 335.

298. *Lukumi*, 508 U.S. at 567 (Souter, J., concurring).

constitutionally limiting principle,"[301] it was most notably used in *Thomas*, where the court exempted religious landlords from the obligation to comply with Alaska's fair housing laws.[302]

2. RFRA

In addition to hybrid-rights, *Smith* also suggested that legislation might be another way around the rule that religious actors are subject to laws of general application. Acting on this suggestion, Congress passed and President Clinton signed RFRA in 1993 in an attempt to restore both judicial balancing and the presumption imposed by strict scrutiny—the scales and the thumb—for religious liberty claims. The operative provisions of RFRA are expressed in section 3, which provides:

> (a) *In General*—Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> (b) *Exception*—Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.[303]

RFRA has two goals: "(1) to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened"; and "(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government."[304] Assuming religion has been identified,[305] the key inquiries under RFRA are (i) whether the governmental action in question substantially

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299. Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5, 30 (1995).

300. Esser, *supra* note 291, at 240 (citation omitted).

301. *Id.* (citation omitted).

302. *See* Thomas v. Equal Rights Comm'n, 165 F.3d 692 (9th Cir. 1999), *opinion withdrawn on grant of reh'g by* Thomas v. Anchorage Equal Rights Comm'n, 192 F.3d 1208 (9th Cir. 1999).

303. 42 U.S.C. § 2000bb-1 (1994).

304. *Id.* § 2000bb(b)(2).

305. As discussed above, *see supra* text accompanying notes 23-52, while it is difficult, and perhaps impossible, to "define" religion, there are good reasons to try to form a definition. How can a court protect a right if it does not know the basis of the right? RFRA avoids the problem, containing no definition of religion. RFRA instead defers to First Amendment case law on the question. *See* 42 U.S.C. § 2000bb-2(4) (defining the exercise of religion to mean the exercise of religion under the First Amendment).

burdens a person's religious practice, and (ii) if so, whether the statute's burdens further a compelling government interest in the least restrictive manner possible.[306]

RFRA was soon challenged and, at least as applied to state law, was held invalid, in *City of Boerne v. Flores*.[307] In *Boerne*, the Catholic Archbishop of San Antonio applied for a building permit to enlarge a church in Boerne, Texas. When local zoning authorities denied the permit, relying on an ordinance governing historic preservation in a district which, they argued, included the church, the Archbishop sued, challenging the permit denial under RFRA.[308] In reversing the Fifth Circuit, the Supreme Court held that RFRA exceeded Congress's remedial powers under § 5 of the Fourteenth Amendment.[309]

Writing for the majority, Justice Kennedy acknowledged that § 5 of the Fourteenth Amendment empowers Congress to enforce, by appropriate legislation, the guarantee that no state shall make or enforce any law depriving any person of "life, liberty, or property, without due process of law," including, by incorporation, the free exercise rights of the First Amendment.[310] RFRA, however, was a substantive change to free exercise jurisprudence that exceeded Congress's remedial powers. "Congress does not enforce a constitutional right by changing what the right is."[311] Although acknowledging that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies," the Court determined that RFRA crossed that line because the injury to be prevented or remedied lacked sufficient congruence and proportionality to the means adopted.[312]

There are two important aspects to *Boerne*'s holding. First, it reaffirms *Smith*'s "weak" protection for religious liberty. "Strong" protection under *Boerne* will be limited to cases where

306. *See* 42 U.S.C. § 2000bb-l(a).

307. 521 U.S. 507 (1997).

308. *See* Flores v. City of Boerne, 73 F.3d 1352, 1364 (5th Cir. 1996), *rev'd*, 521 U.S. 507 (1997).

309. *See Boerne*, 521 U.S. at 536.

310. *Id.* at 507-08 (quoting U.S. CONST. amend. XIV, § 5).

311. *Id.* at 519.

312. *Id.* at 519-20. "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections." *Id.* at 532.

the state intentionally discriminates on the basis of religion, either because a law was aimed at stifling a religious practice,[313] or because a widespread pattern of discrimination was shown.[314] Balancing harms, *Boerne* implies, is simply irrelevant. Quoting *Smith*, the Court reasoned that the Free Exercise Clause does not "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[315]

Second, the *Boerne* Court echoed *Smith*'s anxiety of anarchy, and the potential for systemic disruption posed by broad religious exemptions, however created. The sweeping coverage of RFRA "ensure[d] its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."[316] Although *Boerne* was couched in concern for states' rights,[317] it recognized that permitting one to become one's own law could paralyze our legal system—or at least make it subordinate to the religious convictions of all. Implicit in this concern, of course, is anxiety about the rights of third parties.

It appears, therefore, that a majority of the Court sees no constitutional obligation to balance the harm (to religious actors) of enforcing a law against the harm (to third parties) of creating a free exercise exemption. By eliminating judicial balancing of harms, one would think that *Smith* weakened religious liberty. Yet, *Young* and *Thomas* suggest that strong protection for religious liberty is alive and well in certain contexts—and that balancing of harms is nowhere to be found.

313. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) ("[A] law targeting religious beliefs as such is never permissible . . . .").

314. *See Boerne*, 521 U.S. at 533-36.

315. *Id.* at 537 (Scalia, J., concurring) (quoting Employment Div. v. Smith, 494 U.S. 872, 879 (1990), and United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).

316. *Id.* at 532.

317. The *Boerne* Court characterized RFRA as "a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *Id.* at 534. This trend appears to have its roots in *United States v. Lopez*. 514 U.S. 549 (1995) (limiting the reach of the Commerce Clause).

D. *YOUNG* AND *THOMAS*—STRONG PROTECTION WITHOUT BALANCE

Stripped of the judicial method of balancing harms in contests between neutral laws of general application and claims of religious exemption, religious claimants have taken at least two different approaches to seek strong protection for religious liberty.[318] *Young* relied on RFRA;[319] *Thomas* relied on *Smith*'s hybrid-rights theory.[320] While both decisions share great ambition for protecting religious liberty, neither engages in the balancing of harms required by strong protection. Although it is easy to identify the harms third parties suffer by granting these exemptions—creditors go unpaid, marital-status discrimination is sanctioned—the *Young* and *Thomas* courts simply ignore such harms. While it may be the case that religious exemptions should sometimes be granted in the face of such harm, it is difficult to believe that courts have no role in determining whether religious actors cause such harm.

1. *Young*

In *Young* the Eighth Circuit Court of Appeals held that RFRA trumped the constructive fraudulent conveyance provisions of the United States Bankruptcy Code. The Bankruptcy Code, like the law of every state,[321] provides that transfers of valuable property made while insolvent may be avoided and recovered as constructive fraudulent transfers.[322] "The purpose of the [fraudulent transfer laws] is to preserve a debtor's assets so that creditors may look to them in the event that the debtor ceases payments or is declared bankrupt."[323] Although an in-

318. As noted above, the *Lukumi* case also suggests a third path, if one can show that underinclusive legislation impermissibly targets religious activity. *See Lukumi*, 508 U.S. at 543-44; *see also supra* note 281 and accompanying text.

319. *See* Christians v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854, 856 (8th Cir. 1998).

320. *See* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 702 (9th Cir. 1999), *opinion withdrawn on grant of reh'g by* Thomas v. Anchorage Equal Rights Comm'n, 192 F.3d 1208 (9th Cir. 1999).

321. Every state has enacted one of the uniform fraudulent transfer laws, *see* UNIF. FRAUDULENT CONVEYANCE ACT, 7A U.L.A. 2 (1918); UNIF. FRAUDULENT TRANSFER ACT, 7A U.L.A. 266 (1984), or a predecessor statute with similar effect. *See, e.g.*, VA. CODE ANN. § 55-81 (Michie 1991); An Acte agaynst fraudulent Deedes Gyftes Alienations, &c., 1571, 13 Eliz., ch. 5 (Eng.)).

322. *See* 11 U.S.C. § 544 (1994).

323. First Fed. Sav. & Loan Ass'n v. Napoleon, 701 N.E.2d 350, 354-55

solvent debtor may continue to deal with his or her assets in the ordinary course, the debtor "may not give them away and thereby put them beyond the reach of creditors."[324] Since the Youngs were insolvent when they tithed to their church, the problem was easily framed.[325] Ordinarily, such expenditures would be avoided and recovered for the benefit of the Youngs' creditors. If, however, the donations were a religious exercise, and avoidance would "substantially" burden such exercise, the Bankruptcy Code would have to cede to RFRA.

The *Young* court began its analysis of the burden caused by avoidance by comparing two prior cases, *In re Newman*[326] and *In re Tessier*.[327] In *Newman*, the bankruptcy court for the district of Kansas held that the fraudulent conveyance provisions of the Bankruptcy Code violated neither the Free Exercise Clause nor RFRA because "recovery of fraudulent transfers has been a basic tenet of bankruptcy law for 400 years."[328] Although noting that Congress could have exempted tithes from the fraudulent conveyance statute, the *Newman* bankruptcy court concluded by reasoning that Bankruptcy Code § 548 was "sufficiently narrow" to survive a challenge under RFRA since "[c]learly, the statute was drawn in such a way as to balance the ability of the debtor[s] to dispose of property with the need to protect unsecured creditors."[329]

In *Tessier*, by contrast, the Bankruptcy Code's rules regarding Chapter 13[330] reorganization plans were not considered

(Mass. 1998) (citing Jorden v. Ball, 258 N.E.2d 736 (Mass. 1970); Blumenthal v. Blumenthal, 21 N.E.2d 244 (Mass. 1939)).

324. *Id.* at 355.

325. *See* Christians v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854, 857 (8th Cir. 1998).

326. *See* Christians v. Crystal Evangelical Free Church (*In re* Young), 82 F.3d 1407, 1414 (8th Cir. 1996) (citing *In re* Newman, 183 B.R. 239 (Bankr. D. Kan. 1995)), *reh'g en banc denied*, 89 F.3d 494 (8th Cir. 1996), *cert. granted, vacated, and remanded*, 521 U.S. 1114 (1997), *aff'd* 141 F.3d 854 (8th Cir.1998), *cert. denied*, 119 S. Ct. 43 (1998).

327. *See In re Young*, 82 F.3d at 1417 (citing *In re* Tessier, 190 B.R. 396 (Bankr. D. Mont. 1995)).

328. *In re Newman*, 183 B.R. at 251-52. Interestingly, the *Newman* bankruptcy court cited the *Young* district court, which was, after the *Newman* bankruptcy court opinion, reversed by the Eighth Circuit Court of Appeals. *In re Young*, 82 F.3d 1407, *reh'g en banc denied*, 89 F.3d 494 (8th Cir. 1996).

329. *In re Newman*, 183 B.R. at 252.

330. *See* 11 U.S.C. §§ 1321-1329 (1994). Chapter 13 is similar to Chapter 11 of the Bankruptcy Code, in that its goal is reorganization rather than liquidation. Chapter 13 reorganizations are available only to individuals of somewhat limited means who have a regular income.

sufficiently compelling to deny a debtor's future right to tithe under the plan. In *Tessier*, a bankruptcy trustee had objected to the debtor's proposal to tithe $100 per month under the debtor's plan of reorganization.[331] *Tessier* overruled the trustee's objection. Citing *Sherbert*, the *Tessier* court reasoned that compelling governmental interests are "only those interests pertaining to survival of the republic or the physical safety of its citizens."[332] The *Tessier* court acknowledged that the government had a legitimate interest in providing the debtor with a fresh start, efficiently administering bankruptcy cases, and protecting creditors. Yet, that court concluded, such interests fell "short of direct national security and public safety concerns."[333] The *Tessier* court reasoned that these interests, although "rational, and even important," were "not sufficiently grave to deserve the 'compelling' label when balanced against a parishioner's free exercise of religion."[334]

Acknowledging that the *Tessier* court "arguably" used a "narrow[er]" test than *Newman*, the *Young* court considered *Tessier* "substantively similar" to the Youngs' case.[335] Thus, the *Young* court concluded that "the interests advanced by the bankruptcy system are not compelling under the RFRA."[336] If third parties were not harmed, this conclusion would be less controversial. But the *Young* court apparently believed that

331. *See In re Tessier*, 190 B.R. at 396. The *Tessier* court also found RFRA unconstitutional. *See id.* at 405-07. The procedural context of *Tessier* was quite different from *Young* or *Newman*, as the *Tessier* case involved confirmation of a plan of reorganization, under which the debtor was required to pay all of its "projected disposable income" for three years to creditors. *Id.* at 397. Charitable contributions were not considered "reasonable living expense[s]," and are not part of the definition of "disposable income" for purposes of this calculation. *Id.* at 403.

332. *Id.* at 405. It is not clear how the *Tessier* court developed this analysis.

333. *Id.*

334. *Id.* (citing Sherbert v. Verner, 374 U.S. 398, 406 (1963)). This is not the *Sherbert* test. As discussed above, the "feeble" nature of *Sherbert*-era protection for religious liberty was far stingier to religious claimants. *See supra* notes 226, 264 and accompanying text.

335. Christians v. Crystal Evangelical Free Church (*In re* Young), 82 F.3d 1407, 1420 (8th Cir. 1996), *reh'g en banc denied*, 89 F.3d 494 (8th Cir. 1996), *cert. granted, vacated, and remanded*, 521 U.S. 1114 (1997), *aff'd* 141 F.3d 854 (8th Cir.1998), *cert. denied*, 119 S. Ct. 43 (1998). As discussed below, it could be argued, contra the *Young* court, that *Tessier* was not "substantively similar" to the Youngs' case since, among other reasons, the *Tessier* trustee's success would directly prevent a future religious exercise, whereas the Youngs' trustee was merely seeking to undo that which the Youngs' had already done. *See id.*

336. *Id.*

harm to third parties caused by religious exercise is irrelevant. It was not even considered, even though RFRA, by its terms, requires courts to balance the burden on religion against the "compelling" (and least restrictively implemented) governmental interest.[337] Unless one believes RFRA is *more* protective of religious liberty than *Sherbert* and *Yoder*—a position belied by the terms of the statute—the Eighth Circuit should at least have considered the harm caused. Specifically, "strong" protection under *Sherbert* and *Yoder* should have led the *Young* court to consider whether the "private" repayment rights of creditors were as "compelling" as the state's interest in, for example, requiring religious actors to pay taxes[338] or to participate in the social security system.[339]

Courts and commentators[340] have wrestled with the question whether contributions to churches by insolvent donors are

337. *See* 42 U.S.C. § 2000bb-1(b) (1994).

338. *See* Hernandez v. Commissioner, 490 U.S. 680, 699 (1989); *see also* Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 385-92 (1990).

339. *See* United States v. Lee, 455 U.S. 252, 254-61 (1982); *see also* Keating, *supra* note 1, at 1049.

340. *See generally* Kathleen M. Cerne, *Honor Thy Creditors?: The Religious Debtor's Constitutional Conflict with Section 1325(b)*, 98 COM. L.J. 257 (1993); Michael M. Duclos, *A Debtor's Right to Tithe in Bankruptcy Under the Religious Freedom Restoration Act*, 11 BANKR. DEV. J. 665 (1995); Nicholas A. Franke, *Servitude Without Solvency: The Debtor's Right to Continue Religious Contributions During a Chapter 13 Rehabilitation Plan*, 66 WASH. U. L.Q. 183 (1988); Keating, *supra* note 1; Lipson, *supra* note 134; Leonard J. Long, *Religious Exercise as Credit Risk*, 10 BANKR. DEV. J. 119 (1993-1994); Richard Collin Mangrum, *Tithing, Bankruptcy and the Conflict Between Religious Freedom and Creditor's Interests*, 32 CREIGHTON L. REV. 815 (1999); Bruce W. Megard, Jr., *Tithing and Fraudulent Transfers in Bankruptcy: Confirming a Trustee's Power to Avoid the Tithe After* City of Boerne v. Flores, 71 AM. BANKR. L.J. 413 (1997); Donald R. Price & Mark C. Rahdert, *Distributing the First Fruits: Statutory and Constitutional Implications of Tithing in Bankruptcy*, 26 U.C. DAVIS L. REV. 853 (1993); Todd J. Zywicki, *Rewrite the Bankruptcy Laws, Not the Scriptures: Protecting a Bankruptcy Debtor's Right to Tithe*, 1998 WIS. L. REV. 1223; Troy S. Anderson, Comment, Christians v. Crystal Evangelical Free Church (*In re* Young): *Why Would "Christians" Take Money Out of the Church Offering Plate?*, 4 REGENT U. L. REV. 177 (1994); Steven Hopkins, Comment, *Is God a Preferred Creditor? Tithing as an Avoidable Transfer in Chapter 7 Bankruptcies*, 62 U. CHI. L. REV. 1139 (1995); Carol Koenig, Comment, *To Tithe or Not to Tithe: The Constitutionality of Tithing in a Chapter 13 Bankruptcy Budget*, 32 SANTA CLARA L. REV. 1231 (1992); Bruce Edward Kosub & Susan K. Thompson, Note, *The Religious Debtor's Conviction to Tithe as the Price of a Chapter 13 Discharge*, 66 TEX. L. REV. 873 (1988); Aric D. Martin, Comment, *Chapter 13 and the Tithe: Is God a Creditor?*, 56 OHIO ST. L. REV. 307 (1995); Brian Wildermuth, Note, *In re* Lee: *Tithing as Grounds for Dismissal Under Section 707(b) of the Bankruptcy Code*, 26 U.

constructive fraudulent conveyances and, if so, whether avoiding and recovering the contributions violates the religious liberty of the donor or the church. To some extent, the issue has been rendered academic by the Religious Liberty and Charitable Donation Protection Act of 1998, which creates a broad exemption from recovery for charitable contributions generally (defined to include more than simply religious contributions) not in excess of 15% of the gross annual income of the debtor for the year in which the transfer was made.[341]

Yet *Young* remains the law, and its indifference to third-party harm is troubling. The Supreme Court has never recognized a free exercise exemption that would relieve the Youngs of their fiduciary duties or impair the contractual rights of their creditors.[342] It is beyond dispute that financially impaired debtors such as the Youngs are fiduciaries of their creditors under the "trust fund doctrine."[343] As fiduciaries, insolvent debtors must exercise the "due care, diligence and skill both as to affirmative and negative duties . . . required of . . . 'an ordinarily prudent man in the conduct of his private affairs under similar circumstances and with a similar object in view.'"[344] More specifically, these fiduciary duties include the obligations not to "waste" assets or to favor "insiders" over other creditors.[345] This fiduciary duty may explain the equitable maxim

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TOL. L. REV. 725 (1995).

341. 11 U.S.C. § 548(a)(2) (1994). Although beyond the scope of this Article, the Charitable Protections Act has much to commend it and raises some interesting questions of its own. In expanding the category of protected transactions beyond solely those involving religion, the drafters wisely avoided the Establishment Clause problem that may have arisen by "promoting" religion. *See* Texas Monthly v. Bullock, 489 U.S. 1, 1 (1989). The Charitable Protections Act suggests, however, by negative inference, that RFRA and *Young* may not have been strong enough to protect the insolvent religious donor. If, as I argue, *Sherbert* was not terribly protective of religious liberty in fact, and should not have been used to protect the donations in *Young*, the clear and discrete carve-out of the Charitable Protections Act appears to be an improvement. Whether Congress should have the power to interfere with *state* fraudulent conveyance laws, as imported by § 544 of the Bankruptcy Code is, however, another matter, left for further analysis. *See generally* City of Boerne v. Flores, 521 U.S. 507, 511 (1997) (striking the Religious Freedom Restoration Act of 1993 as applied to a state zoning law).

342. *See* Keating, *supra* note 1, at 1049; Lipson, *supra* note 134, at 303.

343. *See, e.g., In re* Mortgageamerica Corp., 714 F.2d 1266, 1268-72 (5th Cir. 1983); Wood v. Dummer, 30 F. Cas. 435, 436-38 (C.C.D. Me. 1824) (No. 17,944).

344. Ford Motor Credit Co. v. Weaver, 680 F.2d 451, 461 (6th Cir. 1982); *see also In re* Johnson, 518 F.2d 246, 251 (10th Cir. 1975).

345. *See* Amussen v. Quaker City Corp., 156 A. 180, 182 (Del. 1931); Geyer

often invoked in fraudulent conveyance litigations, "be just before you are generous."[346] In one sense, therefore, the Youngs were trustees for their creditors; they were not donating their own money, but the funds held for the benefit of their creditors.[347]

While the Youngs' creditors may have enjoyed (and been deprived of) private fiduciary and contractual rights, it is not clear that they enjoyed a property right in the Youngs' assets. One's instinct is to say that they did not. They did not, for example, have the possessory rights of a lien creditor. Yet recent precedent suggests that the Court views "property" as an expanding category of rights and interests, one that protects the "reasonable investment-backed expectations" of market participants.[348] In *Eastern Enterprises v. Apfel*,[349] for example, four Justices[350] concluded for the first time that federally imposed liability for employment benefits violated the Takings Clause.[351] The obligation to fund employee benefits under the Coal Industry Retiree Health Benefit Act of 1992,[352] the *Eastern* plurality reasoned, was a taking because the coal company

v. Ingersoll Publications Co., 621 A.2d 784, 791 (Del. Ch. 1992).

346. Rudy v. Austin, 19 S.W. 111, 113 (Ark. 1892). This equitable maxim is widely cited by courts in the context of fraudulent conveyances. *See, e.g.*, Boston Trading Group, Inc. v. Burnazos, 835 F.2d 1504, 1508 (1st Cir. 1987) (interpreting Massachusetts law); Mercantile Nat'l Bank v. Aldridge, 210 S.E.2d 791, 793 (Ga. 1974); Birney v. Solomon, 181 N.E. 318, 320 (Ill. 1932); First Nat'l Bank v. Frescoln Farms, Ltd., 430 N.W. 2d 432, 436 (Iowa 1988); Lutherville Supply & Equip. Co. v. Dimon, 192 A.2d 496, 498 (Md. 1963); Lafayette Fin. Corp. v. Cunningham, 143 A.2d 700, 702 (R.I. 1958); Durham v. Blackard, 438 S.E.2d 259, 263 (S.C. Ct. App. 1993); Walker v. Loring, 36 S.W. 246, 247 (Tex. 1896); Brimhall v. Grow, 480 P.2d 731, 734 (Utah 1971).

347. *See, e.g., In re Mortgageamerica Corp.*, 714 F.2d at 1266; *Dummer*, 30 F. Cas. at 435; ; *see also* Keating, *supra* note 1, at 1048 (discussing "externalities" created by denying recovery of tithes that are fraudulent conveyances); *cf.* Zywicki, *supra* note 340, at 1268 (claiming, without support, that there is "no basis" for the foregoing proposition).

348. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

349. 524 U.S. 498 (1998) (plurality opinion).

350. *See id.* Justice O'Connor delivered an opinion in which Chief Justice Rehnquist, and Justices Thomas and Scalia joined.

351. *Eastern Enters.*, 524 U.S. at 504. The Takings Clause provides: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The Takings Clause applies to the states through the Fourteenth Amendment. *See* Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 239 (1897).

352. 26 U.S.C. §§ 9701-9722 (1994 & Supp. II 1997). This Act would have required a company that had long since left the business of coal mining to pay future health benefits for employees (and their dependents) who had been employed by the company when it engaged in coal mining.

had a "property right" in its "reasonable investment-backed expectations" about the level of benefits it had agreed to provide to its former employees announced in *Kaiser Aetna v. United States*.[353]

If one agrees with Justices O'Connor, Rehnquist, Thomas and Scalia, one may conclude that *Young* effected a taking. Did RFRA not, as applied in *Young*, defeat the "reasonable investment-backed expectations" of the Youngs' creditors? The Youngs' creditors probably understood that debtors like the Youngs could declare bankruptcy, a result of which would be a modest, fractional distribution to creditors, followed by a discharge of the debtors' debts. Yet such creditors would also expect that a bankruptcy trustee would be able to use the avoiding powers of the Bankruptcy Code (e.g., the constructive fraudulent conveyance provisions) to recover transfers not supported by consideration (e.g., the Youngs' tithe). Why RFRA should defeat that expectation is unclear. Like *Calder v. Bull*, on which the *Eastern Enterprises* plurality relied for its Takings Clause analysis, one may conclude that "'[i]t is against all reason and justice' to presume that the legislature has been entrusted with the power to enact 'a law that takes *property* from A and gives it to B.'"[354] Yet—if one believes the Youngs' creditors had a reasonable investment-backed expectation in repayment—that is what RFRA did.

It is certainly possible that the Youngs' creditors in fact suffered little from this application of RFRA. Indeed, given the amounts in question, it is unlikely that they suffered any meaningful economic harm.[355] The problem, however, is the

353. *See Eastern Enters.*, 524 U.S. at 523 (citing Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)). *Kaiser Aetna* held that a court confronting a regulatory takings problem should conduct an "essentially ad hoc, factual inquir[y]" that focuses on (i) the "economic impact of the regulation," (ii) the regulation's "interference with reasonable investment backed expectations," and (iii) the "character of the governmental action." *Kaiser Aetna*, 444 U.S. at 175.

Justice Kennedy, in partial dissent, decried this extraordinary conclusion. The "constant limitation" of the Court's Takings Clause analysis, he wrote, "has been that in all cases where the regulatory taking analysis has been employed, a specific property right or interest has been at stake." *Eastern Enters.*, 524 U.S. at 541 (Kennedy, J., concurring in judgment; dissenting in part). Here, Justice Kennedy pointed out, the Coal Act "does not operate upon or alter an identified property interest." *Id.* at 540.

354. 524 U.S. at 523 (quoting Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798)).

355. *See, e.g.*, Brief of Appellant on Remand from the Supreme Court of the

next case based on the rule of *Young*. Should creditors scrutinize the credit-worthiness of religious actors more carefully than others, in order that they may hedge against this risk?[356] What makes this kind of third-party harm tolerable, when so many others—an out-and-out taking of property, for example—are intolerable? One would never know from reading *Young*.

2. *Thomas*

The (now withdrawn) *Thomas* opinion[357] commits the same sins as *Young*. After concluding summarily that leasing property was a religious exercise, the Ninth Circuit Court of Appeals held in *Thomas* that the "strong" protection of *Smith*'s "hybrid rights" exception exempted religious landlords from compliance with Alaska's fair housing law.[358] While such an exemption may be permissible in certain cases, it is difficult to understand why the Court of Appeals failed even to consider the harm to unmarried couples its holding would cause. Rather, like *Young*, the *Thomas* court appeared to believe that balancing harms was no longer relevant to religious liberty analysis.

The *Thomas* court began its "hybrid rights" analysis by distinguishing three general approaches to the hybrid rights problem.[359] Courts could require religious liberty claimants to

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United States at 27, Christians v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854 (8th Cir. 1998) (No. 93-2267 MNMI) (citing Michael J. Herbert & Domenic E. Pacetti, *Down and Out in Richmond, Virginia: The Distribution of Assets in Chapter 7 Bankruptcy Proceedings Closed During 1984-1987*, 22 U. RICH. L. REV. 303, 310-11 & n.30 (1988)) (suggesting that because "some 96% of Chapter 7 bankruptcies are no-asset cases," creditors would suffer little harm by permitting religious debtors to tithe).

356. While that may be rational creditor behavior, it would likely violate the Equal Credit Opportunity Act, which prohibits discriminating in the extension of credit based on such factors. *See* 15 U.S.C. § 1691(a) (1994) ("It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . on the basis of race, color, religion, national origin, sex or marital status . . . .").

357. Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692 (9th Cir. 1999), *opinion withdrawn on grant of reh'g by* Thomas v. Anchorage Equal Rights Comm'n, 192 F.3d 1208 (9th Cir. 1999).

358. *Id.* at 711, 717.

359. *Id.* at 703. The court gave some attention to the question whether hybrid rights exist. Because "*Smith* did not overrule *Cantwell*, *Murdock*, *Follett* and *Yoder*," the court concluded that "[we] are not at liberty to ignore them." *Id.* Although beyond the scope of this Article, it is worth noting that it is fundamentally unclear whether *Smith* was simply *recognizing* a pattern in religious jurisprudence or creating a new rule. *Cf.* City of Boerne v. Flores, 521 U.S. 507, 562 (1997) (acknowledging the hybrid rights exception; suggesting

show that the non-free exercise right was (i) merely "implicated,"[360] *or* (ii) merely "colorable,"[361] *or* (iii) "independently viable."[362] The *Thomas* court recognized that a rule of "implication" would be too broad: "Government action will almost always 'implicate' a host of constitutional rights, even though it does not seriously threaten, much less violate, any of them."[363] Yet requiring the "other" right to be "independently viable" would render the Free Exercise Clause component of the claim irrelevant.[364] According to the *Thomas* court, the middle path—a "colorable-claim standard"—would be "neither too lax nor too strict, but 'just right.'"[365]

The *Thomas* court acknowledged that a "colorable claim" standard is nevertheless hard to define. The standard will "require courts reviewing free exercise claims to make difficult, qualitative, case-by-case judgments regarding the strength of companion-claim arguments."[366] Here, the court of appeals reasoned, the "'center of gravity'" deduced from the many ways in which claims are considered "colorable" in other contexts resembles the test for a preliminary injunction: "In order to trigger strict scrutiny," the Ninth Circuit Court of Appeals concluded, "a hybrid-rights plaintiff must show a 'fair

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that hybrid rights are invoked merely by "implicating" another right).

360. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring). The district court in *Thomas*, in an unpublished decision, took the view that the landlords had only to show that other rights—property or speech—were "implicated" to be exempt from Alaska's fair housing statutes. *See Thomas*, 165 F.3d at 703 (quoting the district court opinion).

361. *Thomas*, 165 F.3d at 703; *see also* Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 700 (10th Cir. 1998).

362. *Thomas*, 165 F.3d at 703. *Cf.* EEOC v. Catholic Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1996) (holding that a proper hybrid rights claims must be "independently viable"); Brown v. Hot, Sexy and Safer Prods., Inc., 68 F.3d 525, 539 (1st Cir. 1995).

363. *Thomas*, 165 F.3d at 705.

364. "[E]lse the Free Exercise Clause itself vanishes." *Id.* at 704 (parentheses omitted) (citing *Lukumi*, 508 U.S. at 567 (Souter, J., concurring)).

365. 165 F.3d at 707.

> [W]e believe that the best understanding of *Smith* actually suggests an approach to hybrid-rights claims that falls somewhere between the two extremes marked out by Justice Souter [in *Lukumi*]. That is to say, an individual claiming to be within the hybrid-rights exception may not rest upon a bald assertion that a companion right exists or the fact that a companion right is somehow "'implicated'" by a government policy.

Id. at 705.

366. *Id.* at 705.

probability'—a 'likelihood'—of success on the merits of his companion claim."[367] Thus, according to the Ninth Circuit, it appears that a "hybrid right" is one that would pass muster in a complaint for a preliminary injunction.[368]

The *Thomas* landlords claimed that one of their companion claims arose under the Takings Clause of the Fifth Amendment. This, they argued, gave them the constitutional right to exclude others from their property. The Ninth Circuit agreed. But in doing so, the court stretched both its own definition of what constitutes a colorable claim for this purpose and existing Takings Clause jurisprudence. The *Thomas* court recognized that Takings Clause cases generally fall into one of two categories: (i) where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation;[369] and (ii) where the government merely regulates the *use* of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole.[370]

While the Alaska fair housing statutes may not have effected a "permanent physical occupation" under cases such as *Yee v. City of Escondido*,[371] the Ninth Circuit concluded that

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367. *Id.* at 706.

368. If this is the standard, it raises two questions. First, how is it less strict than the "independently viable" standard? At least intuitively, it would appear the standards are quite similar. Second, and as discussed below, it would appear that the court of appeals did not actually use this stricter test as to the companion property claim. Instead, the court used the "essentially ad hoc" set of tests announced in *Kaiser Aetna*. *See Thomas*, 165 F.3d at 708 (citing Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)). It is not clear how, short of *ipse dixit*, one can show a "likelihood of success" on "ad hoc" merits.

369. *See id.* at 709 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982)).

370. *See id.* at 708 (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123-25 (1978)).

371. 503 U.S. 519, 531 (1992) (concluding that because a California mobile-home park had "voluntarily open[ed] [its] property to occupation by others, [it could not] assert a *per se* right to compensation based on their inability to exclude particular individuals"). In *Yee*, the Supreme Court held that the Escondido rent control ordinance did not constitute a permanent physical occupation. *See id.* at 539. In so doing, the Court did not conduct a regulatory takings analysis. *See id.* at 537-39.

they nevertheless effected a "'regulatory taking.'"[372] Applying the Supreme Court's three-part *Kaiser Aetna* test for a regulatory taking, the *Thomas* court reasoned that a reviewing court must undertake an "'essentially ad hoc, factual inquir[y]'"[373] involving three factors: "(1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action."[374]

The Ninth Circuit acknowledged that Alaska's fair housing statutes did not interfere with the landlords' reasonable "investment-backed expectations," since "[c]ommon sense would appear to dictate [that a] rule requiring a landlord to rent to a certain class of otherwise disqualified people would enlarge the pool of prospective renters, and thus perhaps increase—but certainly not decrease—his bottom line."[375] Yet according to the Ninth Circuit the "'bottom line' is not the sole measure of a successful Takings Clause claim."[376] Citing *Loretto v. Teleprompter*, the court reasoned that a permanent physical occupation would be a taking even if the government action improved the value of property.[377]

The *Thomas* court went on to reason that the landlords fared better under the "'character-of-regulation'" prong of the regulatory takings analysis.[378] Quoting *Penn Central*, the Ninth Circuit noted that "'[a] "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the social good.'"[379] Although it acknowledged that the Alaska statutes effected no permanent physical occupation, the *Thomas* court concluded that such laws nevertheless caused a "'physical invasion' of the

372. *See Thomas*, 165 F.3d at 708 (citing Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)).

373. *Id.* (quoting *Kaiser*, 444 U.S. at 175).

374. *Id.* (citing Eastern Enters. v. Apfel, 524 U.S. 498 (1998)).

375. *Id.* at 708.

376. *Id.* at 708-09.

377. *See id.* at 709 (citing Loretto v. Teleprompter, 458 U.S. 419, 437 n.15 (1982)). As the dissent noted, *Loretto* addressed "issues squarely within the area of physical takings, not the regulatory taking which is at issue here." *Id.* at 725 (Hawkins, J., dissenting).

378. *Id.* at 709 (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

379. *Id.* (quoting *Penn Cent.*, 438 U.S. at 124).

landlords' property just the same."[380] Thus, the Alaska fair housing laws went "'too far'" as a regulatory taking under *Pennsylvania Coal*.[381]

It is not clear why the court concluded that the landlords had a colorable takings claim.[382] By its own test, a "colorable" claim for a hybrid-rights analysis turns, like a preliminary injunction claim, on showing a "'fair probability'—a 'likelihood'—of success on the merits."[383] Yet if, as the court also acknowledged, a taking under *Kaiser Aetna* is an "'essentially ad hoc, factual inquir[y],'"[384] how—short of ipse dixit—could the court have concluded that the landlords would have "likely" succeeded on their takings claim? Moreover, the court's analysis simply misreads *Penn Central*. *Penn Central* made plain the distinction between "physical invasions," on the one hand, and interference arising from "'some public program adjusting the benefits and burdens of economic life,'" on the other hand.[385] The court did not explain—perhaps because it could not—how Alaska's fair housing statutes were the former rather than the latter.

More generally, as the dissent noted, the court confused the two strands of takings analysis, the permanent physical occupation versus regulatory taking.[386] According to the dissent, "the very heart of the regulatory takings doctrine is that the regulation has gone 'too far' by depriving the owner of the 'economically beneficial and productive use of land.'"[387] Here, of

380. *Id.*

381. *Id.* (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

382. *Thomas* also concluded that the landlords enjoyed a "hybrid" right under the Speech Clause because the Alaska statutes forbade the landlords from making "written or oral inquiry" into the marital status of a prospective tenant. *Id.* at 710. Analysis of that component of *Thomas* is beyond the scope of this Article. One would imagine, however, that the Ninth Circuit's liberal approach to commercial speech precedent was no different from its creative interpretations of Takings and Religion Clause precedent. *See id.* at 709. The court noted that "[t]here is no litmus test for distinguishing commercial from noncommercial expression." *Id.* at 709. It is not clear whether *Thomas* turned on the "hybrid" of religion *plus* property, or the "tri-brid" of religion *plus* property *plus* speech.

383. *Id.* at 706.

384. *Id.* at 708 (citation omitted).

385. *Id.* at 709 (quoting Penn Cent. Trans. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

386. *See id.* at 724-25 (Hawkins, J., dissenting).

387. *Id.* at 725 (quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992)). Under *Lucas*, the landlords would have had to show (i)

course, the majority acknowledged that the regulation likely enhanced the value of the landlords' property.[388] It is simply not clear how the Alaska statutes went "too far."

Finally, there is the question of remedy. It is well recognized that exemption from the offending statute is not the remedy if the government takes property in violation of the Fifth Amendment. Rather, the remedy is compensation for the lost value of the property.[389] It is perhaps no accident that the court failed to indicate the cost of violating the statute—a $500 penalty and conviction of a misdemeanor.[390] If there were truly a "colorable" takings claim, the remedy would be to exempt the landlords from the $500 penalty, not to declare the law inapplicable to them.[391]

After concluding that Alaska's fair housing statutes violated a "companion" right of the landlords, the court considered whether the statutes violated the landlords' right to free exercise of religion. *Thomas* began its "burdens" analysis by distinguishing *Braunfeld v. Brown*, which held that Jews could not be granted a Free Exercise Clause exemption from Sunday closing laws.[392] The mere fact that Sunday closing laws made business more costly for Jews (who were thus forced to close two days, rather than one) was not a "substantial burden" on religion. According to *Thomas*:

> [t]he burden imposed upon [the landlords] is qualitatively different—though we think no less severe—than an imposition of increased cost: The Alaska housing laws de facto banish [the landlords] from the Alaska rental market altogether and force them to forsake their livelihoods as apartment owners and lessors. The laws . . . do not effect a

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they were deprived of "all economically beneficial use" of their property, and (ii) that the proscribed use was not part of title to begin with. *Lucas*, 505 U.S. at 1029.

388. *See Thomas*, 165 F.3d at 708. Enhanced value is a factor under the regulatory takings analysis but not under the permanent physical occupation analysis.

389. *See, e.g.*, Eastern Enters. v. Apfel, 524 U.S. 498, 554 (1998) (Breyer, J., dissenting) (citing Pennsylvania Coal Co. v Mahon, 260 U.S. 393, 415 (1922)).

390. *See* ALASKA STAT. § 18.80.270 (Michie 1998).

391. One may respond that the effect is the same. An exemption from the penalty is qualitatively equivalent to exemption from the law. Yet if our concern is with the method, then the point is not the result of *Thomas*, but the analysis. As with so many aspects of the case—standing, ripeness, the viability and application of the "hybrid rights" exception to *Smith*—the *Thomas* court appears to have been overeager to reach a result at odds with established precedent.

392. *See Thomas*, 165 F.3d at 713 (citing Braunfeld v. Brown, 366 U.S. 599 (1961)).

> mere marginal reduction in business; they put [the landlords] out of business.[393]

While this sounds quite dramatic, it should be remembered that the landlords had been engaged in this business—and presumably religious—since 1986.[394] If found "guilty," the fine would have been $500. The statute would not have required them to forsake their livelihoods. Moreover, "[u]ntil [the landlords] filed this lawsuit, the principal agency responsible for enforcement of these measures had never even heard of them and for good reason: no one has ever filed a complaint about their rental practices."[395]

Like *Young*, the problem with *Thomas* is less the result than the method. Even if one does not think that this particular case goes too far, it offers absolutely no limiting principle on the power of religious actors to harm third parties. What if, instead of unmarried couples, the landlords' religion compelled them to decline to rent to Jews or African-Americans? What if, as in the *Watson* case, religious claimants believed their religion entitled them to own chattel slaves? What if they decided to tear down their apartments and build skyscrapers topped by churches, in violation of applicable zoning ordinances?[396] While others will no doubt think of more colorful horrors,[397] it is difficult to escape the conclusion that *Thomas* also goes "too far."[398]

III. ON BALANCE—EQUITY JURISPRUDENCE AND SUBSTANTIAL JUSTICE

The ultimate problem is not whether *Young* or *Thomas* selected or applied the correct rule, but whether rules, as such, can ever truly resolve religious liberty disputes that pit the rights of the religious actor against the rights of third parties. The rights of third parties should not always defeat all claims of religious liberty. Nor should religious liberty always defeat the rights of third parties to be free from harm. Nor, most importantly, can anyone considering these questions in the abstract offer as an answer a categorical rule. The current morass of judge-made tests and exceptions proves the point. Few serious students of religious liberty believe that the Court's re-

393. *Id.*

394. *See id.* at 724 (Hawkins, J., dissenting).

395. *Id.* at 718. This issue goes more directly to the questions of ripeness, justiciability and standing. On those questions, Judge Hawkins noted in dissent, "[t]he approach of the majority ought to alarm any serious student of judicial restraint." *Id.*

ligious jurisprudence taken in the aggregate—from *Reynolds* to *Sherbert* to *Smith*—is coherent or helpful.[399] Indeed, the rules do not even succeed on their own terms. *Young* and *Thomas* show that *Smith* has produced the very anarchy it sought to banish.

Courts can mend the distortions of our religious liberty jurisprudence by restoring judicial balancing in competitions between religious actors and private third parties. Courts do not, however, need to announce a new multipart test to do this. They already have the necessary tools in equity jurisprudence. Equity is especially useful in this context because it links judicial balancing to an expansive hunt for facts. Through equity, judges cast a wide net to understand the parties' motives and the harms they cause one another, and to address what the sere formulae of "law"—as distinct from equity—would view as irresolvable competitions of equal right. Equity offers a way to heal the infirmities of *Young* and *Thomas*, their failure to inquire into whether the activities were religious exercises and, if so, to balance the competing harms of enforcing the laws in question.

396. *See* St. Bartholomew's Church v. City of New York, 914 F.2d 348, 351 (2d Cir. 1990).

397. Other horrors include church exemptions from liability for negligently hiring priests that sexually molest parishioners, *see* Gibson v. Brewer, 952 S.W.2d 239, 243 (Mo. 1997), and trademark infringement laws, *see* Maktib Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar, 179 F.3d 1244, 1246 (9th Cir. 1999).

398. At least six state appellate courts have dealt with substantially similar facts. *See* Swanner v. Anchorage Equal Rights Comm'n, 868 P.2d 301, 308 (Alaska 1994), *reh'g granted, withdrawn from bound volume, modified, and reissued per curiam*, 874 P.2d 274 (Alaska 1994); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909 (Cal. 1996); Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 42 (Ct. App. 1991), *review granted in banc*, 825 P.2d 766 (Cal. 1992), *review dismissed in banc as being improvidently granted*, 859 P.2d 671 (Cal. 1993) (not published in the official reporter); Attorney General v. Desilets, 636 N.E.2d 233, 242-43 (Mass. 1994) (reversing summary judgment for the defendant-landlords under the Massachusetts constitution); McReady v. Hoffius, 593 N.W.2d 545, 545 (Mich. 1999) (TABLE, NO. 108995, 108996) (holding that the Free Exercise Clause trumps Michigan's civil rights act); State v. French, 460 N.W.2d 2, 10 (Minn. 1990).

399. Except, perhaps, as fodder for legal scholarship.

A. EQUITY JURISPRUDENCE—A SOURCE OF BALANCE

Many scholars have lamented the abandonment of balancing for a variety of reasons and in a variety of contexts.[400] Professor Steven Smith, for example, has argued that only "prudentialism"—a kind of ad hoc balancing—can adequately address contests between claims of religious freedom under the Free Exercise Clause and neutral laws of general application.[401] Louis Henkin has argued that judicial balancing "softens the rigors of absolutes, makes room for judgment and for sensitivity to differences of degree."[402] The erratic nature of religious liberty jurisprudence alone suggests that absolute or categorical rules, while important in certain contexts, simply cannot produce adequate results when strictly applied to religious liberty claims that compete with the rights of third parties.[403]

The methods of equity—the source of a "remedy where the law did injustice"[404]—can help restore a more healthy balance

400. *See generally* Gressman & Carmella, *supra* note 25; Steven D. Smith, *Unprincipled Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 497, 501 (1996).

401. *See* Smith, *supra* note 400, at 501-02 ("A prudential approach to religious freedom controversies would not try to find the 'correct' solution to any particular controversy, but would instead seek to work out a relatively acceptable compromise or *modus vivendi*." (footnote omitted)). *See generally* STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (1995). Professor Smith has argued that even before the *Smith* case, the Court never really "balanced" competing interests in the religious liberty context. *See* Smith, *supra* note 264, at 530-31. Rather, as in *Yoder*, the Court has avoided the difficult task of balancing by claiming that permitting a religious liberty exemption furthers, or at least does not impair, the legislative goal in question (e.g., the schooling of children).

402. Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1047 (1978).

403. *See* Michael C. Dorf, *God and Man in the Yale Dormitories*, 84 VA. L. REV. 843, 850 (1998) (discussing new approaches to strict scrutiny—including the "hybrid-rights" approach—and suggesting that "within a decade, federal law will have gone from purportedly requiring religious exemptions to not requiring them, back to requiring them then back again to not requiring them, and finally to requiring them again").

404. PETER CHARLES HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA 8 (1990). Although equity is largely foreign to constitutional jurisprudence, it has made modest appearances in both *Sherbert* and *Watson*. In his concurrence in *Sherbert*, for example, Justice Stewart suggested that a balance of equities could perhaps salvage the Court's Establishment Clause jurisprudence. *See* Sherbert v. Verner, 374 U.S. 398, 414 (1963) (Stewart, J., concurring) ("[T]here are many situations where legitimate claims under the Free Exercise Clause will run into head-on collision with the Court's insensitive and sterile construction of the Establishment Clause."

to religious liberty jurisprudence in claims involving third parties.[405] The methods of equity work in "the interstices of law,"[406] offering ways to navigate between otherwise acceptable "'general statements'"[407] or categories of law that would lead to unjust results. Although equity is hardly perfect—unchecked judicial discretion may lead to anarchy, impermissible discrimination, etc.—it at least offers two concrete benefits over current jurisprudence involving disputes between religious actors and third parties: (i) an established body of law (largely involving competing, legitimate property claims) under the rubric of the "balance of equities," and (ii) an established way to "engage in [a] wide-ranging examination of factual issues behind the pleadings."[408]

Professor Peter Hoffer has thoughtfully explored the constitutional uses of equity jurisprudence, arising chiefly from *Brown v. Board of Education of Topeka*,[409] the "greatest 'equity' suit in our country's history, perhaps in the history of equity."[410] According to Professor Hoffer, the equitable principles enunciated in *Brown*, which led to the conclusion that federal courts should insure school desegregation with "all deliberate speed,"[411] teach that "equity [is] an approach to law, including

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(footnote omitted)). In *Watson*, the Court noted that the interpretation of a trust benefiting a church would result in no entanglement with religion because the "general doctrine . . . of equity as to charities . . . seems equally applicable to ecclesiastical matters." Watson v. Jones, 80 U.S. (13 Wall.) 679, 723 (1871).

405. "Methods" exclude, for purposes of this Article, equitable remedies. While equitable remedies may (or may not) be appropriate in religious liberty disputes, the topic is so broad as to be well beyond the scope of this Article. If one views equitable remedies as all judicial action other than an award of money damages, *cf.* Bowen v. Massachusetts, 487 U.S. 879, 925 (1988) (Scalia, J., dissenting) (noting that "damages after the fact are considered an 'adequate remedy' in all but the most extraordinary cases"), one could conclude that *all* religious liberty exemptions are a species of equitable remedy. Granting a religious liberty exemption is, in form and effect, an injunction against the ability of the state (or third party) to enforce an otherwise valid right or remedy. *See, e.g.*, Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 742-45 (1990) (discussing injunctions against unlawful speech and counterinjunctions against "prior restraint").

406. HOFFER, *supra* note 404, at 8.

407. *Id.* (quoting ARISTOTLE, NICHOMACHEAN ETHICS 313-17 (H. Rockham ed., 1934)).

408. *Id.* at 161-62.

409. 349 U.S. 294 (1955).

410. HOFFER, *supra* note 404, at 4.

411. 349 U.S. at 301 (1955).

constitutional law, based on doing justice for all concerned."[412] Professor Hoffer locates several species of equity, the most important of which for purposes of this Article is the "balance of equity."[413]

The balance of equity in United States jurisprudence came in two waves.[414] In the first, post-Civil War courts such as the Pennsylvania Supreme Court in *Richard's Appeal*, used the balance of equity to conclude that the cost of granting a nuisance injunction to a small landowner harmed by a large neighboring factory did not justify the cost to the factory of a court-ordered shut down.[415] Although the court found that the smokestack may have caused a nuisance, the court remanded the case for the chancellor in equity to "consider whether he would not do a greater injury by enjoining than would result from refusing, and leaving [the petitioner] to his redress at the hands of a court and jury."[416] "It is elementary law," the court reasoned, "that in equity a decree is never of right, as a judgment at law is, but of grace."[417]

The second wave of balance of equity cases was more "supple,"[418] reflecting a broad "contextual analysis" of the competing claims of the parties.[419] Perhaps reflecting progressive political trends of the late nineteenth and early twentieth centuries, this second wave of cases enabled courts to engage in "wide-ranging examination of the factual issues behind the pleadings . . . invit[ing] counsel for both sides to produce mountains of detail to sustain the plaintiff's prediction of damage to come and the defendant's reckoning of future economic losses."[420] Thus, in

412. HOFFER, *supra* note 404, at 7. Other scholars have hinted at the possibility that equity may be appropriate in the religious liberty context. *See generally* Arnold H. Loewy, *Rethinking Free Exercise of Religion After* Smith *and* Boerne*: Charting a Middle Course*, 68 MISS. L.J. 105, 110 (1998) ("The number of relevant factors to be considered under a Constitution dedicated to protecting both equality and free exercise of religion is such that any fair effort to achieve a balanced result requires a court to act virtually as a court of equity."); Volokh, *supra* note 222, at 1465 (arguing that RFRA-type laws create a "common-law exemption model" under which exemption decisions are initially made by courts and are ultimately revisable by legislatures).

413. *See* HOFFER, *supra* note 404, at 147-79.

414. *See id.* at 147, 157.

415. *See id.* at 152 (citing Richard's Appeal, 57 Pa. 105 (1868)).

416. *Richard's Appeal*, 57 Pa. at 113-114.

417. *Id.* at 113.

418. HOFFER, *supra* note 404, at 147.

419. *Id.* at 157.

420. *Id.* at 161-62.

Whalen v. Union Bag & Paper, for example, the New York Court of Appeals in 1913 carefully balanced the costs to lower riparian owners whose farms were being destroyed by waste from an upstream paper mill against the losses attending the upstream mill owner, who had hundreds of employees and had made substantial investments in the plant.[421] These balance of equity cases "allowed judges to manage appropriate solutions to otherwise intractable problems."[422] It became a method of approaching "clash[es] of equal rights."[423]

Disputes between religious actors and third parties, such as those in *Young* or *Thomas*, are often clashes of "equal rights." The Youngs' bankruptcy trustee had a legitimate right to recover payments that were not supported by adequate consideration. Alaska's legislature had a legitimate interest in eliminating housing discrimination. Yet if donating money or leasing real property were religious exercises in those cases, the Youngs and the landlords would have had equally legitimate claims to be exempt from those otherwise legitimate laws. The problem with *Young* and *Thomas* is the failure to examine and consider facts, the failure to determine whether these activities were religious exercises and if so, whether the harm to third parties of religious exercise outweighed the harm of injunction.

It is not enough, however, to say that equity simply provides a method for resolving disputes. One must also say why it is a *better* method than those currently in play. It is, for four reasons. First, if we take the anxiety of entanglement seriously, then we must recognize that courts face an exquisite dilemma whenever they attempt to resolve competitions between religious actors and third parties. Not only do such disputes involve "equal" claims of right, but they often involve rights that are very important. Indeed, if the deep deference of *Young* and *Thomas* is the rule, and religious exercise is always what the religious claimant says it is, courts will, in such contests, always risk arbitrating competing claims of religious doctrine. Equity provides a well-established basis for courts to inquire independently into the nature of conduct to determine whether it is, in fact, religious exercise or not. A little independent scrutiny can go a long way.

421. 101 N.E. 805, 805 (N.Y. 1913).

422. HOFFER *supra* note 404, at 171 (citing W. Keeton & C. Morris, Note, *Balancing the Equities*, 18 TEX. L. REV. 412, 416 (1940)).

423. *Id.* at 153.

Second, legal preferences for a religious actor or group to the claims of private individuals constitute the most toxic form of establishment.[424] Such preferences will place courts in the untenable position of conducting the heresy trials they fear. While "neutrality" is a term frequently used but little understood in religious liberty jurisprudence, it at least has aspirational value. The methods of equity give courts a way to manifest this aspiration.[425] Equity tends toward neutrality.

Third, the anxiety of anarchy counsels that we do not permit individuals to become laws "unto themselves" because, in doing so, they may hurt others. Yet contests involving truly "equivalent" rights designed to prevent such harms cannot be resolved by a rule of law. Instead, courts should realistically acknowledge that competing claims of religious actors and third parties can best be resolved on the equities of each case. While this method is not without its risks—it requires us to trust our judges—it reflects the complex, post-formalist world in which we live.[426]

Fourth, equity enables courts, religious actors and third parties to take one another seriously. *Young* and *Thomas* may have been victories for the religious actors in those cases. But the methods of those cases—deep deference without balancing harms—bespeak judicial indifference to the claims of religious actors, third parties and courts. The methods of equity, by contrast, enable litigants to shed the lifeless forms of religious liberty jurisprudence, and to state their cases in plain terms. Courts will have little choice but to respond with equal sobriety. While Solomonic decisions may not always result, even losing parties are more likely to accept defeat if they believe their case has been heard. Moreover, equity can enable future courts to determine whether an activity is an exercise of relig-

424. *See, e.g.*, Larson v. Valente, 456 U.S. 228, 244-47 (1982) (using the Establishment Clause to strike down solicitation regulations as they applied to the Unification Church because the regulations preferred more traditional religions).

425. *See, e.g.*, Laycock, *supra* note 212, at 994 (noting the "aspirational"—if not the decisional—value of "neutrality").

426. For more general discussions of legal realism in other contexts, see generally Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961), and Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). For a discussion of the benefits and burdens of balancing versus categorical, or "rule" based judging, see Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 294 (1992), who argues that neither approach should govern in all disputes.

ion, and how to balance the harm (to religious actors) of forbidding the activity against the harm (to third parties) of permitting it. Equity will enable courts to do more than apply brittle rules to supple problems.

B. SUBSTANTIVE CRITERIA—HOW TO BALANCE

To learn how to balance harms, courts will first have to figure out what they are balancing. Courts will therefore first have to consider seriously whether an activity is a religious exercise, an analysis notably absent from *Young* and *Thomas*. Defining religious exercise is properly a delicate judicial task. Courts should therefore define religion contextually, in light of the effect such a definition will have on the parties concerned. Some courts in some cases have already done so. Thus it is hard to say the *Alamo* court erred in concluding that running service stations was not, in fact, a religious exercise. *Alamo* succeeded because it defined "religious exercise" for a particular purpose in a particular context. It may be the case that someday we will, as a society, view running service stations as a religious exercise. Today, however, we do not take that claim seriously because so few people engaged in the activity would say the activity is a religious exercise and because the harm to third parties is fairly clear.

Second, courts should seriously consider whether, and if so, how, third parties are affected by a religious exercise. To do this, they will have to determine, in part, whether third parties are even present. Many of the most troubling religious liberty decisions, such as *Reynolds*[427] and *Smith*,[428] are disturbing precisely because they failed to do this. Instead they granted the state enormous and intrusive power without recognizing that the manner in which church members marry, or whether church members ingest an obscure but nevertheless illegal hallucinogen, have little effect on third parties. As *Watson* teaches, the state as abstraction should have precious few powers to interfere with the internal activities of religious organizations.[429] But as one crosses the boundary from internal to external—as third parties appear—one should recognize a

427. *See* Reynolds v. United States, 98 U.S. 145 (1879). As discussed above, *Reynolds* held that criminal laws against polygamy could be applied to Mormons. *See id.* at 166.

428. *See* Employment Div. v. Smith, 494 U.S 872, 885 (1990) (holding that peyote worship could be criminalized).

429. *See supra* text accompanying notes 55-77.

legitimate state interest in regulation or prohibition. Distinguishing "internal" from "external" is not easy, but the contractual principles discussed above, offer a method of doing so.

How does this play out in legal terms? The burdens of proof and persuasion should follow the presence of third parties. Where the state cannot show that a religious exercise will harm third parties, it should bear the burden of strict or heightened scrutiny. Such scrutiny should not be "feeble" but harsh. Unless we agree that *Reynolds* and *Smith* are correct as written—a position with few takers—we should recognize that the state has few legitimate interests in internal church matters. The thumb should rest on the scales in favor of religious actors in inverse proportion to the presence of third parties. However, where religious exercise harms third parties—because, for example, it reduces returns to creditors, or sanctions marital-status discrimination—the scale should be evenly set. Religious actors should not enjoy the presumptive force of strict scrutiny, however derived. Courts should, in such contests, do the hard work of determining whether the conduct really is a religious exercise and if so, whether it is of sufficient importance to warrant an exemption.

Courts that take their jobs seriously should not assume that evenly set scales always result in a loss to the religious liberty claimant. So viewed, *Young* would come out the same. Creditors did suffer modest harm, but that harm seems insignificant when compared to the religious significance of tithing to the Youngs. *Thomas*, by similar reasoning, would not. It is difficult to argue that being a landlord was a religious exercise, or that the choice really imposed on the landlords was "untenable." At worst, as in *Braunfeld*, the landlords would bear the same cost (a fine) that anyone else violating the law would bear.

Some may object that equity, with its emphasis on balancing, is inappropriate because the Free Exercise Clause, like all of the Constitution, is supreme and categorical law.[430] While such a reading may be appropriate when the state alone is involved, the presence of third parties should change the analysis. Trying to impose bright-line tests in religious liberty contests involving third parties seems a failed endeavor. Thus,

430. *See* Melville B. Nimmer, *The Right to Speak From* Times *to* Time: *First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 939 (1968) ("[A]d hoc balancing . . . means that there is no rule to be applied, but only interests to be weighed.").

the erratic nature of *Sherbert*-era precedent makes one question how supreme or categorical the Free Exercise Clause really was, even at its apex. It seems unrealistic, at least, and perhaps even dangerous, to demand absolutism in contests between claims of religious liberty and third-party harm.

Others may object that leaving balancing to courts exposes religious actors, especially adherents of minority or foreign religions, to discrimination. There is clearly some merit in this concern. It would appear that adherents of minority religions—including Jews—have never won a free exercise exemption from a generally applicable law before the Supreme Court. A cynic might say that the real difference between *Braunfeld* and *Sherbert* is sectarian, not legal. Christians sometimes win; Jews and Native Americans always lose. Yet this anxiety—the anxiety of entanglement—cannot be so strong as to rule religious liberty jurisprudence. It must be balanced against the anxiety of anarchy. Only by balancing these anxieties can we hope to develop an expansive and fair body of religious liberty jurisprudence.

CONCLUSION

We maintain ordered religious liberty through two competing anxieties, entanglement and anarchy. These anxieties can and should be balanced against one another, much as the competing claims of religious actors and third parties may be balanced one against the other. Through these anxieties, judges recognize the many competing constitutional and institutional values embodied in the religion clauses. One such value should be respect for third parties. While protecting third parties should not be the only, or necessarily the most important, value in our religious liberty jurisprudence, it has had—and should continue to have—an important role.

The *Young* and *Thomas* decisions fail methodologically because they ignore the problem of third-party harm in defining the scope of religious liberty exemptions. They abdicate the judicial duty to scrutinize independently the claim of religious exercise when third parties are at risk, and they engage in little or no balancing of harms. The rehearing of the *Thomas* case creates an important opportunity to address these shortcomings, perhaps through the use of equity jurisprudence. Respect for religious actors, third parties and the law require more sober and balanced decisions than have been seen so far.